VOLUME 68 APRIL 1955 NUMBER 6

HARVARD LAW REVIEW

MR. JUSTICE JACKSON

Felix Frankfurter *

SUCH are the paradoxes of life that one with unique opportunities for understanding the operations of the judicial process in Mr. Justice Jackson is by that very fact barred from sharing with readers the adventure of pursuing insight. Not that Brother Jackson and I saw things with a common eye. How could we, if for no other reason than the great differences in our backgrounds. Apart from the influential dissimilarity between our professional training and experience, he was a child of the country before Ford came, while the big city marked me as its own. The first opinion written by Jackson, J., was in characteristically vigorous dissent from an opinion of mine. *Indianapolis v. Chase National Bank*, 314 U.S. 63 (1941). And in the last case in which he wrote, *United States v. Harriss*, 347 U.S. 612 (1954), we were on opposite sides. Our conflicting views in these two cases could readily be used as texts to expound differences of outlook on the larger issues of which the two cases were instances, of differences in evaluation of the clashing factors which had to be accommodated in the two situations. What is more immediately relevant, however, about these two cases at the beginning and at the end of his judicial career and others between them is their proof that what binds men in fellowship is not identity of views but harmony of aims.

That law in its comprehensive sense is at once the precondition and, perhaps, the greatest achievement of an enduring civilization

* Associate Justice, United States Supreme Court. A.B., College of the City of New York, 1902; LL.B., Harvard, 1906.

since without it there is either strife or the enslavement of the spirit of man; that law so conceived expresses the enforcible insights of morality and the endeavors of justice; that law is not word-jugglery or the manipulation of symbols; that precedents, while not foreclosing new truths or enlarged understanding, are not counters to be moved about for predetermined ends; that this significance and rôle of law must particularly be respected in a continental federal society like ours; that the Supreme Court as the ultimate voice of this law must always be humbly mindful of the fact that it is entrusted with power which is saved from misuse only by a self-searching disinterestedness almost beyond the lot of men — these were convictions which Justice Jackson passionately entertained. They were part of him. He scrupulously applied them, though he moved, like everyone else, within the outer limits of his temperament and understanding.

This estimate of his outlook and views is not the private gleaning of a fellow-worker. To an unusual degree in the history of the Court, Justice Jackson wrote as he felt. In his case the style was the man. It is my impression that the opinions of most Justices have conformed to what they conceived to be the appropriate form of an opinion. In the delicious classification that Mr. Justice Cardozo made of legal opinions, he emphasized literary style. But I think the style often reflects the writer's notion of the form in which an opinion should be cast or his desire to promote one purpose rather than another. A literary genius like Holmes no doubt writes the way he must. But there have been men on the Court whose conception of the required austerity of a Supreme Court opinion rigorously held in check an otherwise lively pen. Again, it makes a difference whether an opinion-writer consciously aims to be understood by the casual newspaper reader, or whether he has a strong sense of the educational function of an opinion within the profession, and more particularly among law teachers, or writes merely to dispose of the case.

While Justice Jackson and I never discussed the art of opinion-writing, and so I speak only on the basis of impressions open to every reader of his opinions, I would put him in a different category. He belonged to what might be called the naturalistic school. He wrote as he talked, and he talked as he felt. The fact that his opinions were written talk made them as lively as the liveliness of his talk. Unlike what he praised in Brandeis, his style sometimes stole attention from the substance. He had

"impish candor," to borrow one of his own phrases. Candor, indeed, was one of his deepest veins. Even an occasional explosion was a manifestation of his candor. There was nothing stuffy about him, and therefore, nothing stuffy about his writing. To confess error was for him a show of strength, not of weakness. No man who ever sat on the Supreme Court, it seems to me, mirrored the man in him in his judicial work more completely than did Justice Jackson.

Of all the adjectives that have been used to characterize him for me the most apt are gifted and beguiling. He was ineluctably charming, but his charm was not a surface glitter. It compelled affection and was not marred by passing temper or irritation. Gifted in the case of Justice Jackson does not imply the talent only for brilliant flashes or evanescent displays. His gifts were solid. They were revealed in the Swiftian irony of his famous Alfalfa Club Speech on January 31, 1953, his arresting arguments before the Supreme Court, his impressive opening and closing at Nuremberg. Mr. Justice Brandeis said that Jackson should be Solicitor General for life. The function of an advocate is not to enlarge the intellectual horizon. His task is to seduce, to seize the mind for a predetermined end, not to explore paths to truths. There can be no doubt that Jackson was specially endowed as an advocate. He appreciated a good phrase, even his own. But his aims increasingly groped beyond that of mere advocacy. He steadily cultivated his understanding in the service of these aims; the advocate became the judge. Deeper insight made him aware that the best of phrases may be less than the truth and may even falsify it. He had the habit of truth-seeking and faithfully served justice.

MR. JUSTICE JACKSON

Louis L. Jaffe *

IT has often been remarked that Americans are the most legalistic of peoples. Every great issue is transformed into a question of law, preferably constitutional law. The Judge is exalted as Lawgiver and Prophet. He must have the wisdom of Solomon, the moral vision of Isaiah, the analytic power of Socrates, the intellectual creativity of Aristotle, the humanity of Lincoln, and the impartiality of the Almighty. Measured by these expectations every judge is something of a disappointment. But Mr. Justice Jackson understood the nature of the challenge. From the first on the Court, he set himself to perform grandly. He had a "big" virtuoso style, magnificent and athletic in exposition, powerful and ingenious in argument, racy, sardonic, alive with the passion and wit of his personality. Though grand, it was not grandiloquent. It had the startling changes in pace, the sudden pungencies, the wry ironies that characterize the "modern" manner. His judicial philosophy was the philosophy of the man of the law, conscientious counsel for the community, and for each of the classes of the existing community as he knew and admired it. He was essentially a traditionalist. But he defended, he revivified the tradition with an intensity, an urgency, a conviction which were novel.

The very flamboyance of his manner may obscure his merit and his significance. He scorned judicial caution; he drafted his pronunciamentos with grand broad strokes, sometimes with so relatively little regard for the case at hand that he could be accounted something less or even something other than a judge. He was the fighting lawyer, contentious to a fault. He had ambition for intellectual leadership and for high position and did not care if it was seen. Battle was his only complete element; at best it gave him wings to soar. But he was forever skirmishing, mostly with his colleagues; sometimes gleefully tweaking them with his unfailing sarcasm but at other times angrily, mordantly belaying them with smashing irony. He was morbidly sen-

* Byrne Professor of Administrative Law, Harvard Law School. A.B., Johns Hopkins, 1925; LL.B., Harvard, 1928, S.J.D., 1932.

sitive to intellectual or moral hypocrisy, and allowed himself easily to be persuaded of its presence. He would pitch the fight in terms of the sincerity of his colleagues rather than the solution of the case. Hypocrisy in his view was the mask of a distorting partisanship, of an allegiance to class or at least to particularized and thus short-sighted policies. Strong spirits — the passionate doers plunging whole into the fray — are rarely pure. Fertility breeds fantasy as well as fact. Yet despite occasional intolerance, Justice Jackson's intellectuality was comprehensive. He was thoroughly aware that he in turn was vulnerable to the charges of partisanship. Indeed, it is part of our interest that the outspoken boldness of his method required him to develop a judicial philosophy which would validate an avowedly personal choice of major premises.

We can see now what we could not have seen then, that from Jackson's point of view, the moment of his accession was a crucial one. Holmes, Brandeis, and Stone had triumphed. The Court had accepted the power of the legislature to fashion popularly conceived solutions to passing economic problems. The axioms of *laissez faire* had been mustered out of the due process clause. In the past when state taxation and regulation were so persistently disallowed by application of the commerce or due process clause, one was entitled to suspect a motivating hostility to the legislation. Thus the very appeal to constitutional inhibitions had come to be a mark of reaction. The judicial dogmatics of federalism, having been abused in the cause of reaction, were now being attacked precisely because they were dogmatic. The liberal wing of the Court had devised an antidogmatic. Each state assertion of power was assayed in its turn on a somewhat *ad hoc* basis, the state's "interest," its need, brought into focus and valued sympathetically.[1] There can be no doubt that the great men who composed this group still held fast to a conception of a broad underlying constitutional structure. But what most appeared at the time was the erosion of concepts, and the philosophy under the

[1] A striking example is South Carolina State Highway Dep't v. Barnwell Bros., Inc., 303 U.S. 177 (1938), permitting the state to regulate weights and sizes of interstate trucks in order to preserve its highways. With this compare the very different phrasing and attitudes seven years later of the majority opinion by the same justice (Stone) in Southern Pac. Co. v. Arizona *ex rel.* Sullivan, 325 U.S. 761 (1945), invalidating a law of Arizona limiting, on alleged safety grounds, the number of cars on interstate trains. The two cases are, of course, distinguishable, but the method of attack is strikingly dissimilar.

aegis of which the erosion was taking place. It was a philosophy which had finally become dominant in the schools, one which saw the law as a process which set itself the task of continuously accommodating conflicting interests. Indeed, it is nearly impossible for us today to think of the law in any other way. But we can and still do differ as to the operative meaning of this idea. To the simon-pure "realist" each conflict was to be apprehended and evaluated in terms of its overwhelming immediacy, of its current complex of "realities." This or that very problem was to be solved somehow in its own terms or at least not in terms of a doctrine relating it to an indefinite series of problems which had been solved for twenty years past. A constitutional technique sympathetic to the pressing interests of the moment was in tune with the prevailing mode of liberalism which had come to power in the New Deal. Jackson was the seventh of President Roosevelt's appointments. The only appointees of prior administrations left at his accession were Stone and Roberts. It was Roberts who by his vote in *West Coast Hotel Co. v. Parrish*[2] had made a majority leading the legislature out of the Egypt of the due process clause. He had thus turned the flank of the attack on the Court. But he soon came to feel that new if shifting majorities which needed him not were setting up a wilderness of false gods. Sometimes joined in his alarm by Stone or Frankfurter, he had by 1941 fallen into a sad, silent, ineffectual loneliness of dissent. Yet this did not signify that the Justices individually or as a Court had forsaken the prime tenets of the Decalogue. Decisions continued to affirm traditional concepts, but often as not in the face of a dissent which accused the majority of a failure to accept the full implications of the new canon. In these uncertain majorities and frustrated minorities there was no persistent voice which defended the tradition with the magnificent assurance and intellectual address of a Holmes or a Brandeis. There was indeed no awareness — at least among the intelligentsia — that there was an important role for a neoclassical federalism freed from the incubus of *laissez faire*.

We can make no better start than to explore Jackson's working concept of federalism. Federalism was the foundation of his thought; the area of his most clear-seeing and his most conscious

[2] 300 U.S. 379 (1937). The decision upheld the constitutionality of a minimum wage law against a claim of violation of due process and overruled earlier contrary authorities.

constructive activity. In the opening chapter and verse of his judicial prophecy he invoked, as it were, the spirits of Hamilton, Marshall, Bradley, and Hughes. He saw the temple defiled and falling into disrepair and disrepute. He dedicated himself to its renovation. He rallied the Court to the task with exceptional brilliance and audacity.

I. A Lawyer's Federalism

It must have startled and surprised a good many, did they stop to ponder it, when in his very first term Mr. Justice Jackson blasted out a vehement note of protest against the whole course of judicial tolerance of state action, a course just then reaching its full flower in the reversal of earlier decisions. He had been a devoted servant of the New Deal, a General Counsel of the Tax Division, a Solicitor General, an Attorney General, a hard-hitting campaigner denouncing the oligarchy of the Sixty Families.[3] If in his Jamestown days, the small city lawyer had learned to be honest broker for every interest, we in the outer world either did not know it or did not know its significance. He had always been, we may suppose, a moderate reformer. The New Deal brought into harness his vigorous talent as an advocate and his lively ambition as a politician. Elevation to the Court freed him from the pressures of partisan politics. He could now pursue his objectives under the banner of his own philosophy.

Mr. Justice Jackson took his seat on October 6, 1941. Two months later in *Duckworth v. Arkansas* [4] he seized upon a rather unlikely occasion to make a major pronouncement. A statute of Arkansas required a permit for transporting intoxicating liquor

[3] Jackson's book, *The Struggle for Judicial Supremacy*, written in 1941 when he was Attorney General, is an apparently critical account of judicial invalidation of federal legislation. Nothing in his later judicial career contradicts the direct implications of the views expressed in the book: as a judge he set up no constitutional obstacles to federal power. However, by a curious coincidence he quoted from two opinions upholding state action which were in flat contradiction with the views he expressed the same year on the Court in Duckworth v. Arkansas, 314 U.S. 390 (1941). See p. 290 of the book, quoting from the dissent in McCarroll v. Dixie Greyhound Lines, 309 U.S. 176, 188 (1940), and p. 292, quoting from the opinion of the Court in Curry v. McCanless, 307 U.S. 357, 366, 374 (1939). However, as it happens, Jackson quoted them not for their holdings but for their statement of the proposition that the judicial process is not well adapted to settling large issues of governmental power. It will be seen that in a sense Jackson held firm to this view but drew from it conclusions directly opposite to those of the judges from whom he was quoting.

[4] 314 U.S. 390 (1941).

through the state, with the alleged purpose of preventing introduction into state channels contrary to its laws. According to allegations not denied, the liquor involved in the case was being shipped by truck from Illinois to Mississippi for illegal use there. In an opinion by Mr. Chief Justice Stone, the Court upheld the regulation. The Court found no occasion to decide whether the regulation might derive support from the twenty-first amendment prohibiting the "transportation or importation" of intoxicating liquors "into any state . . . for delivery or use therein" in violation of its laws. As against a claim of interference with interstate commerce, it preferred to reply that the regulation was justified as embracing one of those "many matters which are appropriate subjects of regulation in the interest of the safety, health and well-being of local communities which, because of their local character and their number and diversity, and because of the practical difficulties involved, may never be adequately dealt with by Congress." [5] Such a regulation did not impair the "uniformity of control over . . . commerce in matters of national concern" [6] nor materially obstruct the free flow of commerce. Because the Court elected in this almost ostentatious manner to insist on the routine character of its judgment, Jackson chose to treat it as a gratuitous distortion of the commerce clause. Why, he asks in his concurring opinion, does the Court spurn the use of the twenty-first amendment, specifically devised to deal with the liquor traffic? "The people of the United States knew that liquor is a lawlessness unto itself. They determined that it should be governed by a specific and particular Constitutional provision. They did not leave it to the courts to devise special distortions of the general rules as to interstate commerce . . . ." [7] He then indicates that the Court has the prime responsibility of maintaining the freedom of that national economy which was the principal object of the Constitution. "It is a tempting escape from a difficult question to pass to Congress the responsibility for continued existence of local restraints and obstructions to national commerce. But these restraints are individually too petty, too diversified, and too local to get the attention of a Congress hard pressed with more urgent matters." "Our national free intercourse is never in danger of being suddenly stifled by dramatic

[5] *Id.* at 394.
[6] *Ibid.*
[7] *Id.* at 398–99.

and sweeping acts of restraint. That would produce its own antidote. Our danger, as the forefathers well knew, is from the aggregate strangling effect of a multiplicity of individually petty and diverse and local regulations." "The Court's present opinion and tendency would allow the states to establish the restraints and let commerce struggle for Congressional action to make it free. This trend I am unwilling to further in any event beyond the plain requirements of existing cases." [8]

It was a few months later in *State Tax Comm'n v. Aldrich* [9] that the implication and the method of his philosophy began to take form. Some background is necessary to make the matter clear. Edward S. Harkness died domiciled in New York. At the time of his death he owned a large block of shares in the Union Pacific Railroad, a Utah corporation. The certificates were never within Utah. The company kept its stock books in New York. Utah claimed an inheritance tax determined by the value of the shares. The Supreme Court of Utah held that the tax violated the fourteenth amendment. The court was compelled to this result by the ruling of the Supreme Court in *First Nat'l Bank v. Maine*.[10] It was, however, clear by this time that the *First Nat'l Bank* case was living on borrowed time, waiting for the blow which had been prepared for it by the work of Holmes, Brandeis, and Stone. It had been taken for granted for many years that the succession to real property could be taxed only by the situs. Despite the theory *mobilia sequuntur personam* a similar rule had been worked out for tangible personalty having a permanent location.[11] The "old Court" had in the twenties more or less succeeded, over the protest initially of Holmes and then of Brandeis and Stone, in establishing a single jurisdiction competent to tax the succession of intangibles. The Court favored in this respect the domicile of the deceased, on the theory that the transfer "from the dead to the living of any specific property is an event single in character and is effected under the laws, and occurs within the limits, of a particular state; and it is unreasonable, and incompatible with a sound construction of the due process of law clause of the Fourteenth Amendment, to hold that jurisdiction to tax that event may be distributed among a number of states." [12]

[8] *Id.* at 400–01.

[9] 316 U.S. 174 (1942).

[10] 284 U.S. 312 (1932).

[11] See Frick v. Pennsylvania, 268 U.S. 473 (1925).

[12] First Nat'l Bank v. Maine, 284 U.S. 312, 327 (1932).

This unique event so "single in character" was then found to take place at the domicile of the deceased. Mr. Justice Holmes found this line of reasoning unsatisfactory partly because he could find nothing in the fourteenth amendment under the heading of taxation which justified "evoking a constitutional prohibition from the void of 'due process of law' " [13] but more substantially because he could see "hardly any limit but the sky" if the Court, as it was doing here and was doing in so many other cases, were to invalidate a statute which was "for any reason undesirable." [14] At the same time Mr. Justice Stone began to work out a theory — or reworked an older theory — which justified a tax by any state which might be thought to contribute some benefit to the taxpayer. The dissenting views finally prevailed in *Curry v. McCanless*,[15] which upheld double taxation of a trust estate where the trustee held securities in Alabama under a trust established by a Tennessee decedent for Tennessee domiciliaries. It remained in *State Tax Comm'n v. Aldrich* only to point out that Utah was conferring a benefit on Mr. Harkness' estate by having incorporated the company whose shares it owned and by permitting the title to the shares to pass from Harkness to his estate.

It was therefore somewhat ironical that as the whole drama was being brought to its triumphant fruition, the recently arrived junior of the Court joined by the oldest, Mr. Justice Roberts, should reopen the entire war. The difference in tactic between Sutherland, the author of the *First Nat'l Bank* opinion, and Jackson is striking and instructive. Sutherland, solemn, self-effacing, spins a web of ineluctable doctrine out of the fourteenth amendment. The method is effective until the skepticism of a Holmes punctures the orb of illusion. Jackson is all vigor and wit and daring frankness. The opening sentence is arresting: "State taxation of transfer by death of intangible property is in something of a jurisdictional snarl, to the solution of which this Court owes all that it has of *wisdom* and *power*." [16] He will not pretend that he is the passive priest of an oracular Constitution. He confesses that the theory of the *First Nat'l Bank* case is unsatisfactory, its derivation from the fourteenth amendment uncertain. But the

[13] Baldwin v. Missouri, 281 U.S. 586, 596 (1930) (dissenting opinion), 44 HARV. L. REV. 132.

[14] *Id.* at 595.

[15] 307 U.S. 357 (1939). Chief Justice Hughes and Justices McReynolds, Roberts, and Butler dissented.

[16] 316 U.S. at 185. (Emphasis added.)

reasons for overruling the earlier case seem to him no more satisfactory than those which established it. The doctrine of benefit as applied here seems as fictitious as the doctrine of situs which the Court discards: "This older rule ascribed a fictional consequence to the domicile of a natural person; it is overruled by ascribing a fictional consequence to the domicile of an artificial corporation." [17] "Weighing the highly doctrinaire reasons advanced for this decision against its practical effects on our economy and upon our whole constitutional law of state taxation, I can see nothing in the Court's decision more useful than the proverbial leap from the frying pan into the fire." [18]

The majority, it will be recalled, based Utah's power on the benefits conferred by incorporation. This, argues Jackson, ascribes a fictional consequence to the corporate domicile. But the Union Pacific was a national institution long before Utah was a state. "Not even its scandals were local. Its Credit Mobilier scandal rocked the Nation." [19] The value of its shares rests on interstate commerce; every state in the Union — and particularly those through which its tracks run — contributes; Utah's claim to tax the whole value rests on nothing "except the metaphysics of the corporate charter." [20] "All of . . . [the states] have yielded up men to provide government at home and to repel the enemy abroad. I am the very real debtor, but am frank enough to say I hope not a potential taxpayer, of all." [21] The modern corporation is the foundation of a national economy; intangibles constitute well above fifty per cent of all property transferred by death. This decision will subject the economy to confused, overlapping taxes. A large majority of the states have sought by reciprocal arrangement and self-denying ordinance to free the tax structure from overlap. In *First Nat'l Bank v. Maine* the Court was entreated to put the force of the Constitution behind these efforts. "The imposition of unpredictable assessments from many sources makes it impossible for the State of domicile to make intelligent use of its own taxing power as an instrument of enlightened social policy. Chaos serves no social end." [22]

Neither Jackson nor the majority points out that it is the

[17] *Id.* at 186.
[18] *Ibid.*
[19] *Id.* at 189.
[20] *Id.* at 190.
[21] *Id.* at 200.
[22] *Id.* at 196.

sparsely settled rural states such as Utah and Maine that stand to lose by such self-denial, but he would have replied that such disability is the cost of a Union devised to establish a national economy. Indeed, it is precisely Jackson's insistence that Utah and Maine may have to suffer which marks the difference between him and the majority. The majority sees the ever-present conflict of interests as relevant to the decision; multiple taxation reflects multiple need. This resolution of the conflict may be unfortunate, but the Court, it is argued, has not the resources either to judge the situation or provide a justly proportioned remedy. To Jackson this is a counsel of despair or of perfection. Let it be agreed that Utah has an interest and a need. Let it be agreed that the Court can neither appraise the relative merits of competing tax solutions nor devise a fair remedy. It is not the function of the Court to solve Utah's problems but to determine the constitutional framework within which Utah must seek its solution. The Court cannot sit as an economic referee. It is a Court of Law. It can and should pronounce principles of jurisdiction which derive from the premise of a federation pledged to a national economy as free as possible from state economic particularism.

But by what warrant, pursuant to what delegation of authority, was the Court to fashion these principles? Jackson, having announced his bold design, would not be held up by mere doctrinal difficulty. To find in due process a needed limit on state taxing power was "not particularly satisfying." If one found the need for these limits, as Jackson did, in the original Agreement To Form a More Perfect Union, it was more than a little awkward to hack the doctrine out of a provision adopted in 1868. But due process had been used to set up a single jurisdiction for taxing real estate and tangible personalty, and no one proposed now to reverse these decisions. "The Court . . . will be obliged to draw the line at which state power to reach nonresidents' estates and extraterritorial transactions comes to an end. I find little difficulty in concluding that exaction of a tax by a State which has no jurisdiction or lawful authority to impose it is a taking of property without due process of law. . . . Any decision which accepts or rejects any one of the many grounds advanced as jurisdictional for state taxing purposes will read into the Constitution an inclusion or an exclusion that is not found in its text." [23] He boldly adds that to overrule *First Nat'l Bank* is to make new law

[23] *Id.* at 201.

quite as certainly as to adhere to it! To which he appends a footnote, citing Holmes and Cardozo, that fear of judicial legislation need not intimidate those of either view because judges by the very force of their decisions do legislate.[24]

The reader may have already noticed what becomes the more evident with the passage of time. To Jackson, concepts such as interstate commerce, due process, privileges and immunities, and full faith and credit are to be chosen as tools with appreciation of their several qualities. In both *Duckworth* and *Aldrich* his aim is the integrity of the national economy. In *Aldrich* he is prepared to admit the jurisdiction of one state; in *Duckworth* the jurisdiction of none. In *Duckworth* he appeals to the commerce clause; in *Aldrich* to the due process clause. Some may say that the solution in terms of due process would bar even congressional recognition of Utah's claim. I have no doubt that to Jackson this objection would have seemed "academic," something to be faced in the most unlikely event that Congress should desire so bizarre a solution.

The story of this remarkable opinion is not complete without noting its impact on Mr. Justice Frankfurter. I think that it is not an exaggeration to say that he found it intellectually or, more particularly, judicially shocking. Where Jackson opened his dissent by invoking the "wisdom and power" of the Court, Frankfurter begins his concurrence by admonishing: "A case of this kind recalls us to first principles. The taxing power is an incident of government." [25] Since *First Nat'l Bank* was an unwarranted interference with Maine's power when it was decided, it cannot ten years later be any less so. To suggest that respect for the legislature's power is no different than nullification of its power, that either is equally judicial legislation, "is to disregard the rôle of this Court in our Constitutional system since its establishment in 1789." [26]

This fascinating and instructive confrontation of Jackson, boldly improvising high actions, and Frankfurter, sternly asserting the moral responsibility of the judge to principles of self-limitation, may have seemed a presage. But as it fell out the lines of battle were not so drawn. In other matters, for example in interpreting industrial legislation and in administering the com-

[24] *Id.* at 202.
[25] *Id.* at 182.
[26] *Id.* at 185.

mon law governing industrial accidents, Jackson and Frankfurter found themselves unable to accept the evident disposition of at least four of the judges to determine every mooted question in favor of the worker. Thus these two men of marked difference in temperament, early training, and early allegiance found that they had more in common than they had apart; most curiously, in their worship of the law as a philosophy; curious because Jackson's apparently highhanded dealing with the law might have implied a certain contempt for it. And in time Frankfurter, even in the area of state regulation and taxation, began to feel that the Holmes-Stone technique, having served its purpose of freeing constitutional law from the shackles of *laissez faire*, must now be tempered by a return to judicially enforced limits. Black, often though not always joined by Douglas, emerged as the nearly invariable defender of state regulation. Each of the other judges, of course, developed views which ranged him at one time with Jackson, at another with Black. If I represent Jackson and Black as opposing poles of the Court's doctrine, I imply no judgment as to the importance of the other Justices. Jackson is the central character of our drama; his actions can be presented most sharply in terms of the conflict present to his mind. I think it is clear that he came to see Black as his chief antagonist.

In *International Harvester Co. v. Wisconsin Dep't of Taxation*,[27] Jackson again dissented from a judgment which in his view tolerated the atomization of the national financial structure. Wisconsin was permitted to tax the out-of-state shareholders of a corporation doing business in Wisconsin on a pro rata part of a dividend declared in Chicago. In an earlier test of the tax[28] Frankfurter, declaring that labels could be ignored, had upheld the tax as a second tax on the corporation. "[T]he descriptive pigeon-hole into which a state court puts a tax is of no moment in determining the constitutional significance of the exaction."[29] This characterization was thereafter categorically rejected by the Wisconsin court and subsequently the Supreme Court was forced to hold that for federal income taxation purposes the tax was on the shareholder.[30] In the *International Harvester* case it was

[27] 322 U.S. 435 (1944).

[28] Wisconsin v. J. C. Penney Co., 311 U.S. 435 (1940).

[29] *Id.* at 443.

[30] Wisconsin Gas & Elec. Co. v. Dep't of Taxation, 243 Wis. 216, 10 N.W.2d 140 (1943) (tax is not on the corporation); Wisconsin Gas & Elec. Co. v. United States, 322 U.S. 526 (1944) (company cannot deduct payments from gross income

necessary, therefore, to find some new basis upon which Wisconsin could levy a tax on an out-of-state payment to an out-of-state individual. Chief Justice Stone found it in the benefits conferred by Wisconsin on the corporation (which had already been taxed in Wisconsin): the dividends later declared to the shareholders "fairly [measure] . . . the benefits they have derived from these Wisconsin activities." [31] To Jackson this was all so much word play. The corporate surplus, he argued, is an independent entity. It accumulates at varying rates of speed from all over the United States and the world outside. Neither the decision to disburse nor the amount of the dividend has any business or direct accounting relation to earnings in one or another state. "One who puts his savings to work in an enterprise of national scope may be subjected to any number of state taxes on his dividends up to forty-eight." [32] "Might does not make right even in taxation," [33] is his comment on the fact that Wisconsin's control over the corporation makes collection feasible. Wisconsin is therefore without "jurisdiction" to tax this transaction. In this case, then, as in *Aldrich*, Jackson used the due process clause as he would use the commerce clause. If the national market in commodities and transportation must be judicially protected from atomization, so must the related financial structure.

Jackson finally wrote for the Court in two cases which squarely embodied his concepts of state limitation. The first of these was *H. P. Hood & Sons, Inc. v. Du Mond.*[34]

"This case," states Jackson, "concerns the power of the State of New York to deny additional facilities to acquire and ship milk in interstate commerce where the grounds of denial are that such limitation upon interstate business will protect and advance local economic interests." [35] The Commissioner of Agriculture found that if Hood were permitted to purchase additional milk in the countryside around Troy for sale in Boston it would tend to deprive the local market of milk needed during the short season. "The desire of the Forefathers to federalize regulation of

as "taxes paid" by it). The latter case was decided the same day as *International Harvester.*

[31] 322 U.S. at 442.

[32] *Id.* at 450.

[33] *Ibid.*

[34] 336 U.S. 525 (1949), *The Supreme Court, 1948 Term*, 63 HARV. L. REV. 119, 147.

[35] 336 U.S. at 526.

foreign and interstate commerce stands in sharp contrast to their jealous preservation of the state's power over its internal affairs." [36] And how and by whom shall the line be drawn? The state may "protect its inhabitants against perils to health or safety, fraudulent traders and highway hazards, even by use of measures which bear adversely upon interstate commerce." But it "may not promote its own economic advantage by curtailment or burdening of interstate commerce." [37] He quotes Cardozo: the Constitution " 'was framed upon the theory that the peoples of the several states must sink or swim together, and that in the long run prosperity and salvation are in union and not division.' " [38] He relies on *Pennsylvania v. West Virginia*,[39] in which over the dissent of Holmes and Brandeis [40] the Court struck down West Virginia's attempt to give its own inhabitants a preferential right to buy natural gas produced there. "[O]ur economic unit is the Nation . . . ." "Our system . . . is that every farmer and every craftsman shall be encouraged to produce by the certainty that he will have free access to every market in the Nation . . . . [E]very consumer may look to free competition from every producing area in the Nation . . . . Such was the vision of the Founders; *such has been the doctrine of this Court which has given it reality.*" [41] Justice Black dissented in an opinion in which Justice Murphy joined; Justice Frankfurter, in an opinion in which Justice Rutledge joined. Under *Cooley v. Board of Wardens*,[42] argues Black, the commerce clause of its own force only prohibits state regulation of local interstate commerce activities which " 'are in their nature national, or admit only of one uniform system' "; the Court would always "weigh the conflicting interests of state and nation." "The *Cooley* balancing-of-interests principle which the Court accepted and applied in the

---

[36] *Id.* at 533–34.

[37] *Id.* at 531–32.

[38] *Id.* at 532.

[39] 262 U.S. 553 (1923).

[40] Holmes said: "I see nothing in the commerce clause to prevent a State from giving a preference to its inhabitants in the enjoyment of its natural advantages." He then made the rather amazing statement: "Certainly if the owners of the mines or the forests saw fit not to export their products the Constitution would not make them do it. I see nothing in that instrument that would produce a different result if the State gave the owners motives for their conduct, as by offering a bonus." *Id.* at 602–03.

[41] 336 U.S. at 537, 539. (Emphasis added.)

[42] 53 U.S. (12 How.) 299 (1851). The first quotation is from *id.* at 319.

Duckworth case is today supplanted by the philosophy of the *Duckworth* concurring opinion which though presented in the *Duckworth* case gained no adherents. For the New York statute is killed by a mere automatic application of a new mechanistic formula." [43] Yet, argues Black, the problem with which New York here dealt was so peculiarly a local one that it is inconceivable that Congress could pass uniform national legislation. It is, of course, just this fact which in Jackson's view requires judicial protection of the market. But to Black the peculiar vice of the result is the immunization of business from regulation, the creation of a no man's land where "the people's legislative representatives [are] impotent to perform their duty of providing appropriate rules to govern this dynamic civilization." "The judicially directed march of the due process philosophy as an emancipator of business from regulation appeared arrested a few years ago. That appearance was illusory. That philosophy continues its march. The due process clause and commerce clause have been used like Siamese twins in a never-ending stream of challenges to government regulation." [44] Mr. Justice Frankfurter's opinion stops somewhat short of this gloomy and foreboding passion. He had already shown that he would risk a no man's land where the case was clearer. But he felt constrained to dissent because he could not agree "in treating what is essentially a problem of striking a balance between competing interests as an exercise in absolutes." [45] State protection of the internal market is as valid a motive as protection of health; if the interest of the state is urgent and the effect on commerce slight, the state action should be upheld.

---

[43] 336 U.S. at 551, 552, 554.

[44] *Id.* at 563, 562. Justice Black sets out his position strongly in his dissent in Southern Pac. Co. v. Arizona *ex rel.* Sullivan, 325 U.S. 761, 784 (1945), in which the Court invalidated an Arizona law limiting the number of cars on an interstate train on alleged safety grounds. The trial court took evidence and found that the safety grounds were insignificant. Said Black: "[T]he Arizona County Court acted, and this Court today is acting, as a 'super-legislature'. . . . Representatives elected by the people to make their laws, rather than judges appointed to interpret those laws, can best determine the policies which govern the people." *Id.* at 788, 794.

[45] 336 U.S. at 564. The dissent relied heavily on Milk Control Bd. v. Eisenberg Farm Products, 306 U.S. 346 (1939). Pennsylvania was permitted to fix the price at which dealers bought milk in Pennsylvania from Pennsylvania farmers. About 10% of the milk was shipped out of the state. The Court held that though this "incidentally" affected commerce it was not "aimed solely" at commerce. Jackson in *Du Mond* says that "the present controversy begins where the *Eisenberg* decision left off." 336 U.S. at 530.

With these two positions as foil one can better understand Jackson's. Black's prime desideratum, it is clear, is untrammeled legislative power, whether state or federal. Jackson's first concern is a national market, whether or not regulated by Congress. Each is making a choice and each makes his choice in terms of his conception of ultimate utility. A national market is in Jackson's opinion a surer source of national wealth and welfare than all the ingenuity of forty-eight active legislatures. If abuses are too heavy to bear, Congress can remedy them, and he would put no obstacles in the path of Congress.[46] It cannot be said that Jackson is hostile to legislation, but it must be admitted that his faith in it is tempered by skepticism. "We must not forget," he says in one case, "that regulatory measures are temporary expedients, not eternal verities — if indeed they are verities at all." [47] If his quarrel with Black is in the choice of the basic premise, his quarrel with Frankfurter — at least in this case — is in the method of putting it into action. Frankfurter, it will be remembered, would weigh the very great — as he thought — market interest of New York against the very slight — as it appeared to him — interference with the national market. Jackson's objection to this method is put more succinctly in his dissent in *Bob-Lo Excursion Co. v. Michigan.*[48] Here the Court sustained a statute of Michigan applied to forbid color discrimination on boats plying between Detroit and a small pleasure isle in Canada. "The Court admits," Jackson quips, "that the commerce involved in this case is foreign commerce, but subjects it to the state police power on the ground that it is not very foreign." "The commerce clause was intended to promote commerce rather than litigation." [49] Jackson agrees with the judges when they question the ability of the Court to weigh the competing economic interests of state and nation, but he does not agree when they then conclude that the state regulation in question must be upheld. In his opinion the Court cannot "bal-

[46] See his splendid opinion in Wickard v. Filburn, 317 U.S. 111 (1942). He wrote some of the most important decisions holding that congressional "occupation of the field" excluded state action. Bethlehem Steel Co. v. New York Labor Relations Bd., 330 U.S. 767 (1947); Garner v. Teamsters Union, AFL, 346 U.S. 485 (1953). *But cf.* International Union, U.A.W.A., A.F.L. v. Wisconsin Employment Relations Bd., 336 U.S. 245 (1949); FPC v. East Ohio Gas Co., 338 U.S. 464, 476 (1950) (dissenting opinion).

[47] *Id.* at 489.

[48] 333 U.S. 28 (1948).

[49] *Id.* at 44, 45.

ance" competing claims in terms of the weights to be attached to the conflicting interests in isolated cases; it cannot know whether the harm to the state is greater from inaction than the harm to commerce from action. Because it cannot resolve conflict in these essentially legislative terms, the Court must devise dogmas, mechanical if you will, of a structural, of a constitutional character which make as clear as possible the powers possessed by the state and the nation, which establish the ground rules within which problems must be solved. Decisions can thus be formulated, as they should be, in terms which are relatively neutral toward the statutory policies involved. Jackson draws the line against state regulation at the point where the state seeks to protect its own market from the economic impact of the interstate market.

In a recent case, the influence of this philosophy of Jackson's seems to be pronounced. In *Miller Bros. Co. v. Maryland*,[50] a Delaware merchandising corporation sold goods in Delaware to a nearby Maryland resident who came there to buy. Maryland levied a sales tax on sales within Maryland. Prior cases appeared to establish that it could not levy such a tax on sales in Delaware for delivery in Maryland,[51] but that it might levy on the Maryland buyer a compensating "use" tax.[52] It is difficult, however, to collect such a tax from the buyer. The question in the *Miller* case was whether Maryland could compel the out-of-state vendor to collect and remit the tax to it.

To understand the posture of the law when *Miller* was decided we must retrace our steps somewhat. In 1940 the Court in *McGoldrick v. Berwind-White Coal Mining Co.*,[53] speaking through Stone over the dissent of Hughes, McReynolds, and Roberts, had decided that New York might levy a sales tax on a purchase of coal ordered through the seller's New York sales office, the coal to be delivered in New York from Pennsylvania mines. Stone argued that the tax was "conditioned upon events occurring within the state"; that it "was not the purpose of the commerce clause to relieve those engaged in interstate commerce of their just share of state tax burdens" merely because it increased

[50] 347 U.S. 340 (1954) (5–4 decision), *The Supreme Court, 1953 Term*, 68 HARV. L. REV. 96, 129.

[51] McLeod v. J. E. Dilworth Co., 322 U.S. 327 (1944) (5–4 decision).

[52] Henneford v. Silas Mason Co., 300 U.S. 577 (1937).

[53] 309 U.S. 33 (1940).

the cost of interstate business; and that this tax did "not . . . discriminate against interstate commerce." [54] The Court had in a variety of situations upheld taxes on activities prior or subsequent to "commerce" which "affected" it, among them the compensating use tax. Stone finally relied on the fact that a "use" tax had already been upheld. To Hughes it was a tax "on commerce." "We have the duty of maintaining the immunity of interstate commerce as contemplated by the Constitution. That immunity still remains an essential buttress of the Union; and a free national market . . . is not less now than heretofore a vital concern of the national economy." [55] The *Berwind-White* decision's rejection of formal tests of validity appeared to be clearly in the ascendant. The question would now be not whether the tax was "on" an "interstate sale" but whether it discriminated against commerce or threatened it with peculiar or crippling burdens. *McLeod v. J. E. Dilworth Co.*,[56] four years later, confounded the calculations of the learned. It did not overrule *Berwind-White* but it did hobble its doctrinal tendency. Here was a sale by a Tennessee corporation for delivery in Arkansas. The corporation had no sales office in Arkansas. Five of the Justices, speaking through Justice Frankfurter, said that the tax was one "on" the sale which was "interstate," and the tax therefore was forbidden. It was no defense that Arkansas might seek the same — or nearly the same — result by a "use" tax. "A boundary line is none the worse for being narrow." [57] Justices Douglas, Black, and Murphy dissented because the incidence of the two taxes was the same and the results should "turn on practical considerations and business realities rather than on dialectics." [58] Justice Rutledge attempted a more comprehensive rationalization. He was willing — as Black was not — to use the commerce clause to protect the national market from the likelihood of double exactions. He would permit the buyer state alone to tax in order to protect its internal market from an untaxed competing sale.[59] On the same

[54] *Id.* at 43, 46, 49.

[55] *Id.* at 69.

[56] 322 U.S. 327 (1944).

[57] *Id.* at 329.

[58] *Id.* at 335.

[59] Rutledge's views are expressed in an opinion in International Harvester Co. v. Department of Treasury, 322 U.S. 340, 349 (1944), and in Freeman v. Hewit, 329 U.S. 249, 259 (1946). Professor Abel in his article, *The Commerce Power: An Instrument of Federalism*, 25 IND. L.J. 498, 527 n.187 (1950), 35 IOWA L. REV.

decision day, the *Dilworth* majority was forced in a way almost humiliating to walk its "narrow" line. Iowa had levied a "use" tax on sales by a Minnesota corporation to Iowa residents for delivery in Iowa, and compelled the Minnesota seller to collect and remit the tax on the Iowa buyer. The corporation maintained no office in Iowa but did solicit sales there. "The tax," said Justice Frankfurter, upholding it in the case of *General Trading Co. v. State Tax Comm'n*, "is what it professes to be—a non-discriminatory excise laid on all personal property consumed in Iowa."[60] Dissenting in an opinion in which Justice Roberts concurred, Justice Jackson said: "So we are holding that a state has power to make a tax collector of one whom it has no power to tax."[61] Finally in *Miller* Jackson writes for a majority. Charitably distinguishing *General Trading* because there the out-of-state merchant had entered the state through traveling salesmen, he holds that the statute violates — not the commerce clause — but the due process clause of the fourteenth amendment. There was no "jurisdictional basis" for the tax. In his dissent in *General Trading* there were echoes of both clauses — as was often his way with doctrine — but no precise reliance on either. Iowa's statute did not "seem conducive to good order in the federal system."[62] Jackson was forced to admit that the question was one of degree; he, for example, had written for the Court in permitting a sales tax when an out-of-state seller maintained a branch within the state which received and forwarded orders,[63] a decision which would appear to confirm the authority of *Berwind-White*. He would concede that the state must not be disabled from taxing *merely* because the tax affected interstate commerce. But here the tax — a compensating use tax — was being levied for the very purpose of protecting the internal market *against* interstate commerce. Though the decision does

625, 658 n.187 (1950), notes a discussion he had with Justice Rutledge. Abel questioned Rutledge on the latter's preference for the state of the market. The Justice acknowledged that the subject merited further consideration.

[60] 322 U.S. 335, 338 (1944).

[61] *Id.* at 339.

[62] *Id.* at 340.

[63] Norton Co. v. Department of Revenue, 340 U.S. 534 (1951). The majority of the Court, however, disallowed a tax on orders sent by the buyer directly to the home office. Three of the judges dissented to this. One judge (Reed) would have disallowed the tax on orders sent through the branch if the shipment to the buyer went not via the branch but direct to the buyer (title would then pass in the seller's state).

not discuss the question, it implies a rejection of Rutledge's view that this protection is justified where it is intended to do no more than deprive the interstate commerce of an advantage. Calculation of relative advantage is not so easily achieved. It may cost the out-of-state article more to reach the market than the local product. The compensating use tax may thus exclude the product. In Jackson's philosophy, it was the very purpose of the commerce clause to disable each state from calculating and then by regulation counteracting the adverse effects of a national market. A policy of protection cannot be justified because the Court is willing to agree that it is moderate. *General Trading* and *Miller* are themselves proof of what happens when it is once admitted that a state may "equalize" the adverse effects of commerce. The compensating use tax, approved today, is tomorrow found uncollectible. Having hearkened to the call of market equalization the Court must now yield to the practical implications of the decision. It must permit a state, if necessary to make effective its conception of equality, to regulate the doing of business in another state! Subtly thus the prime determinant becomes not the freedom of interstate commerce but the equalization of commerce by state regulation. Jackson was never forced to commit himself on the validity of the compensating use tax collected within the state of use, but it is typical of his method that he refused to allow himself to be caught in the toils of the earlier decisions which approved it. At some point, by fiat if you will, he would set up the concept of a minimum national market which must be inviolable. Nice calculations of the precise point were offensive to his practical lawyer's sense.[64]

The capstone of Jackson's federalism was the full faith and credit clause. In his Cardozo Lecture on the subject he called it, with a very deliberate emphasis, "The Lawyer's Clause of the Constitution."[65] In this closely packed essay we see not only his system, but his motivation. The mission of the clause, in

[64] In state legislation attacked under the commerce clause, Jackson in split cases was nearly always against the legislation. Dissents: Braniff Airways, Inc. v. Nebraska State Bd., 347 U.S. 590, 602 (1954); Canton R.R. v. Rogan, 340 U.S. 511, 516 (1951) (reserving judgment); Capitol Greyhound Lines v. Brice, 339 U.S. 542, 548 (1950); Memphis Natural Gas Co. v. Stone, 335 U.S. 80, 99 (1948); Independent Warehouses, Inc. v. Scheele, 331 U.S. 70, 91 (1947); Union Brokerage Co. v. Jensen, 322 U.S. 202, 212 (1944).

[65] Jackson, *Full Faith and Credit — The Lawyer's Clause of the Constitution*, 45 COLUM. L. REV. 1 (1945).

Jackson's view, has a visionary grandeur. Our forefathers created a political and economic union by other clauses of the Constitution; by full faith and credit "they sought to federalize the separate and independent state legal systems," "to guard the new political and economic union against the disintegrating influence of provincialism in jurisprudence." [66] There is no federal interest in one or another result of most litigations, but there is a federal interest in the orderly resolution of conflicts. This seems to be a field of law which calls "'in conspicuous measure for certainty and order, for an administration of justice that is strict and in a sense mechanical.'" [67] He envisages a "truly national legal system," [68] not, however, we must hasten to add, a uniform national law but a federation of legal systems to each of which is assigned its jurisdictional competence. It is only the first and most elementary axiom of this proposition that a judgment be given full faith and credit. Jackson's principle of order is much more ambitious. Where more than one state is interested in a litigation, he would seek rules which make the law of one state the uniform measure of decision. The Supreme Court had sometimes done this, but in many other cases, using a "balance of interest" technique it had permitted the application of two or more legal systems to a transaction, as, for example, in workmen's compensation. This "seems to assume that a state must have power to reach a matter because it has an interest in it. . . . I doubt that the position can long be maintained that the reach of a state's power is a by-product of an interest. The ultimate answer, it seems to me, will have to be based on considerations of state relations to each other and to the federal system." [69]

But on what basis then is one state to be favored over all others? This he cannot answer. "I leave you pretty much at large on this subject, for that is where the decisions leave me." [70] But this somewhat disingenuous non sequitur is not his only word on the matter. He has already made his really important point: "Certainly the personal preferences of the Justices among the conflicting state policies is not a permissible basis of determining which shall prevail in a case." [71] "There are no judicial standards of

[66] *Id.* at 17.
[67] *Id.* at 25, quoting from CARDOZO, THE GROWTH OF THE LAW 81–82 (1924).
[68] *Id.* at 33.
[69] *Id.* at 28.
[70] *Id.* at 29.
[71] *Id.* at 28.

valuation of such imponderables. . . . But, even if we could appraise or compare relative local interests, we must lift these questions above the control of local interest and must govern conflict in these cases by the wider considerations arising out of the federal order." [72] The Court should as far as possible decide in terms of formal organizing principles. In the context of social policy such principles, if arbitrary, will nevertheless be neutral. They give promise of permanence. They give the appearance of certainty. They will not, by committing the Court in the public mind to "liberal" or "conservative" views, endanger the Court's authority to speak for the country.

What are these principles? Jackson gives "domicile" as an example. He admits that "we are a mobile people, historically on the move, and perhaps the rigid concept of domicile derived by common law from feudal attachment to the land is too rigid for a society so restless as ours. But if our federal system is to maintain separate legal communities, as the full faith and credit clause evidently contemplates, there must be some test for determining to which of these a person belongs. If, for this purpose, there is a better concept than domicile, we have not yet hit upon it. Abandonment of this ancient doctrine would leave partial vacuums in many branches of the law." [73] Proclaiming this philosophy, Jackson, joined only by Murphy, dissented in *Williams v. North Carolina*,[74] a prosecution for bigamy. Could one spouse, deserting the other, leave North Carolina where both had lived while married, take up domicile elsewhere, and secure there a divorce everywhere effective? [75] The much-criticized case of

---

[72] *Ibid.*

[73] May v. Anderson, 345 U.S. 528, 539 (1951) (dissenting opinion).

[74] 317 U.S. 287, 311 (1942).

[75] It was assumed for the purposes of decision in this phase of the litigation that a bona fide domicile had been acquired in Nevada.

In the "second" *Williams* case, Williams v. North Carolina, 325 U.S. 226 (1945), the jury found that the Nevada domicile was fictitious. The Supreme Court, in a 6–3 decision over a vociferous minority, upheld a conviction for bigamy; in other words, Nevada's jurisdiction depended on the domicile of the divorce-seeking plaintiff and the state of the nonconsenting spouse could retry the issue of domicile. Said Justice Murphy, *id.* at 241, in a concurring opinion in which Justices Jackson and Stone joined:

> By being domiciled and living in North Carolina, petitioners secured all the benefits and advantages of its government and participated in its social and economic life. . . . However harsh and unjust North Carolina's divorce laws may be thought to be, petitioners were bound to obey them while retaining residential and domiciliary ties in that state.

Haddock v. Haddock [76] said "no." *Williams* overruled it on theoretical and practical grounds. Jackson disposes of the latter with a certain levity. The majority is troubled that a person divorced and remarried in Nevada would still be married to the first spouse in North Carolina. "This of course begs the question, for the divorces were completely ineffectual for any purpose relevant to this case. I agree that it is serious if a Nevada court without jurisdiction for divorce purports to say that the sojourn of two spouses gives four spouses rights to acquire four more, but I think it far more serious to force North Carolina to acquiesce in any such proposition." [77] And replying to the point that refusal to recognize the divorce would "bastardize" children of the divorcees, he doubts that it was much more than a "quip" when Mr. Justice Holmes "perpetrated" it, but "in any event, I had supposed that our judicial responsibility is for the regularity of the law, not for the regularity of pedigrees." [78] "It is enough for judicial purposes that to each state is reserved constitutional power to determine its own divorce policy. It follows that a federal court should uphold impartially the right of Nevada to adopt easy divorce laws and the right of North Carolina to enact severe ones." [79] "The Court says that its judgment is 'part of the price of our federal system.' It is a price that we did not have to pay yesterday and that we will have to pay tomorrow, only because this Court has willed it to be so." [80]

Jackson in this dissent makes much of the unfairness of an *ex parte* divorce to the stay-at-home spouse; and as we have seen, he emphasizes the great interest of North Carolina. In the light of these reasons, Jackson's votes in the later divorce cases

---

[76] 201 U.S. 562 (1906).

[77] 317 U.S. at 324.

[78] *Id.* at 324.

[79] *Id.* at 314.

[80] *Id.* at 323.

Compare also his dissent in Connecticut Mut. Life Ins. Co. v. Moore, 333 U.S. 541, 562 (1948), which sustained a New York statute escheating certain insurance policies written in New York:

[I]f we are to entertain the case, I think we should decide it, not by extemporized generalities like "sufficient contacts with the transactions," but by recognized standards having definite connotations in the law. . . . The mobility of our population and the complexity of our life create many confusions in which the states may properly look to us for some standard by which they may know what and whom to claim for their own.

Id. at 562–63. Very interesting is the citation at this point by Jackson of a series of his dissents and concurrences dealing with "jurisdiction" on both commerce and due process grounds.

are consistently startling. He voted with the majority in the *Sherrer* [81] and *Coe* [82] cases in which the Court held that where the spouses had agreed on divorce — that is, where the defendant entered an appearance — the issue of domicile was res judicata and could not be re-examined by the state of the marital domicile. Even more jolting is Jackson's dissenting opinion, a not uncharacteristic exercise in irony, in *Estin v. Estin*.[83] This case, modulating *Williams*, created the so-called "divisible divorce." The Court held that New York, though it must recognize that the stay-at-home was no longer a wife, might enforce her property claims — here alimony under a previous New York separation decree — against her erstwhile husband. Nevada could not adjudicate the wife's property rights without personal service. To this Justice Jackson dissented because "if there is one thing that the people are entitled to expect from their law makers, it is rules of law that will enable individuals to tell whether they are married and, if so, to whom." [84] Jackson purports to see serious uncertainties as a result: whether one is a criminal; whether one's children are legitimate. Yet Jackson continues even here to protest the injustice of the *Williams* doctrine to the stay-at-home wife! "Notified thus of what was going on, she was put to this choice: to go to Nevada and fight a battle, hopeless under Nevada laws, to keep her New York judgment, or to do nothing." [85] But since it has been decided that under full faith and credit she is no longer a spouse, the Court must go on and strip her of everything, otherwise "I do not see how we can square this decision with the command that it be given *full* faith and credit." [86] Are we to suppose that Jackson really felt so compelled by the logic of the *Williams*

[81] Sherrer v. Sherrer, 334 U.S. 343 (1948).

[82] Coe v. Coe, 334 U.S. 378 (1948).

[83] 334 U.S. 541, 553 (1948).

[84] *Id.* at 553.

[85] *Ibid.*

[86] *Id.* at 554. Another in this strange sequence of votes is Jackson's dissent in Rice v. Rice, 336 U.S. 674, 676 (1949). Here the Court permitted Connecticut to examine on behalf of a stay-at-home wife whether her husband had secured a bona fide domicile in Nevada. He had since remarried and died and the wife was seeking letters of administration. Jackson believed that in this case Nevada's finding of domicile was based on substantial evidence. Rice had lived in Nevada six months after the divorce and found employment in nearby California.

> [I]f we adhere to the holdings that the Nevada court had power over her [the wife] for the purpose of blasting her marriage [but that is the very question] and opening the way to a successor, I do not see the justice of inventing a compensating confusion in the device of a divisible divorce by which the parties are half-bound

case? We may suspect that in his role of dissenter he was allowing himself considerable license to express his rather scornful disapproval of *Williams*. By its fruits shall ye know it! Adopt a doctrine, he seems to say, that makes divorce easy because you set little value on a state's interest in the sanctity of the marriage relation; but squirm and crawl to avoid your premise when it becomes a matter of property, in which you do believe. Jackson would apply his chosen premise to both problems. The constitutional lawyer, he is saying, should seek for simplicities. The judge should, if he can, lift himself above the battle of values except, of course, where such values are constitutionally established.

In *Magnolia Petroleum Co. v. Hunt* [87] Jackson underlines this theme in a concurring opinion which gives full vent to his sarcasm. In that case a worker, resident and employed in Louisiana, was injured in Texas and received workmen's compensation there. A majority of the Court held that under the full faith and credit clause the Texas award barred a further Louisiana award. A dissent from Black, Douglas, Murphy, and Rutledge aroused Jackson's fury. "I am unable to see how Louisiana can be constitutionally free to apply its own workmen's compensation law to its citizens despite a previous adjudication in another state if North Carolina was not free to apply its own matrimonial policy to its own citizens after judgment on the subject in Nevada." [88] And so if *Williams* is not to be overruled, he must follow it, though he does not tell us whether absent *Williams* he would decide this case otherwise. "Overruling a precedent always introduces some confusion . . . . But it is as nothing to keeping on our books utterances to which we ourselves will give full faith and credit only if the outcome pleases us." [89] But are the problems created by multiple decrees of status so like those of supplementary compensation awards that a judge must feel compelled to follow the same rule for both? Jackson's indignation will not stoop to such analysis; his purpose here is less to decide the case than to attack the motivation of his adversaries: Black, in Jackson's opinion, is deciding these cases by the degree of his sympathy with the social policies involved.

---

and half-free and which permits Rice to have a wife who cannot become his widow and to leave a widow who was no longer his wife.

Id. at 680

[87] 320 U.S. 430 (1943).

[88] *Id.* at 446.

[89] *Id.* at 447.

His dissent in *Wells v. Simonds Abrasive Co.*[90] illustrates in a less controversial context Jackson's ideal of a single law in whatever forum, state or federal, a controversy may arise. He would have compelled Pennsylvania (the "forum" state) to apply the Alabama statute of limitations to an Alabama-created death action. The purpose of the full faith and credit clause is to promote "uniformities." The result can be achieved here, in his opinion, by applying the rule of the place of the tort, "probably," he notes, "the best settled rule of conflicts in tort cases." [91] Jackson, strongly "constructivist," is thus prepared to use whatever ideas are at hand to build a "federal" system of jurisdictional limitation. The other judges were not prepared to espouse so grand a plan. They were perhaps afraid that they would be asked to review every state conflict of laws decision. And some of them at least were more tender of the "interests" of each of the states involved in these multistate situations.

II. Civil Liberties: The Defense of the Tradition

In *Minersville School Dist. v. Gobitis*,[92] decided before Jackson's incumbency, the Court held that Pennsylvania could compel a school child to salute the flag despite his religious scruples. The legislature, it was said, might reasonably hold that the salute was a necessary means to preserve national unity. This was a field, said Justice Frankfurter, "where courts possess no marked and certainly no controlling competence." It is appropriate "to fight out the wise use of legislative authority in the forum of public opinion and before legislative assemblies rather than to

[90] 345 U.S. 514, 519 (1953). In this case the suit was brought in the federal court. However, the dominant doctrine appears to be that under Erie R.R. v. Tompkins, 304 U.S. 64 (1938), a suit barred in the state court on whatever ground is barred in the federal court. This appears to be implicit in Angel v. Bullington, 330 U.S. 183 (1947), from which Jackson dissented, and in First Nat'l Bank v. United Air Lines, Inc., 342 U.S. 396 (1952), in which he concurred specially:

> It is indeed fanciful to suggest that a state statute relating to the power of its own courts is an applicable "rule of decision" . . . . The petitioner enters the federal court not by the grace of the laws of Illinois but by the grace of the laws of the United States.

Id. at 400. These cases suggest that if Jackson were not to have his way in compelling state courts to apply "federalized" conflicts principles, he would at least have approached his goal by allowing the federal courts in diversity cases to evolve their own "federalized" conflicts principles.

[91] 345 U.S. at 520.

[92] 310 U.S. 586 (1940).

transfer such a contest to the judicial arena." [93] Three years later this decision was overruled in *West Virginia State Bd. of Educ. v. Barnette*.[94] Said Justice Jackson for the Court:

> The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections. . . .
>
> Nor does our duty to apply the Bill of Rights to assertions of official authority depend upon our possession of marked competence . . . . [W]e act . . . not by authority of our competence but by force of our commissions. We cannot . . . withhold the judgment that history authenticates as the function of this Court when liberty is infringed. . . .
>
> If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein. . . .
>
> Compulsory unification of opinion achieves only the unanimity of the graveyard. . . .
>
> The case is made difficult not because the principles of its decision are obscure but because the flag involved is our own. Nevertheless, we apply the limitations of the Constitution with no fear that freedom to be intellectually and spiritually diverse or even contrary will disintegrate the social organization.[95]

Despite the lofty, categorical quality of these pronouncements delivered in the Justice's second term, he did not become one of that group, of which Justices Black and Douglas were the core, which advanced the most unqualified interpretations of the Bill of Rights. Here, as in other matters, his attitudes reflected his experience as a practitioner, his satisfaction with the role of arbiter, his appreciation of the community as an operation in the balancing of diverse elements. He would keep alive and reinforce the traditional role of civil liberties rather than give them a new and increased eminence. There may be indeed a totalitarian threat to civil liberties, but it does not follow that the remedy is to broaden civil liberties, to make them more absolute against competing interests than they have been in the past.

---

[93] *Id.* at 597–98, 600.

[94] 319 U.S. 624 (1943).

[95] *Id.* at 638, 639–40, 642, 641.

In this whole area he has thought most deeply and written most persuasively on free speech. In *Barnette* he says, "freedoms of speech and of press, of assembly, and of worship may not be infringed" simply because the infringing law has a "rational basis." "They are susceptible of restriction only to prevent grave and immediate danger to interests which the State may lawfully protect." [96] But earlier in his opinion there are qualifications which contain the germ of a different emphasis: "The freedom asserted by these appellees does not bring them into collision with rights asserted by any other individual. . . . Nor is there any question in this case that their behavior is peaceable and orderly. The sole conflict is between authority and rights of the individual." [97]

Jackson found himself dissenting in a series of cases in which laws directed toward specific social evils were held to violate freedom of speech or religion. In the earliest of them ordinances forbidding doorbell ringing campaigns were held, as applied to Jehovah's Witnesses, to interfere with freedom of religion.[98] Justice Douglas argued that "this form of religious activity occupies the same high estate under the First Amendment as do worship in the churches and preaching from the pulpit." [99] But to Jackson the protection of the church against hostile intrusion and discrimination was entirely different from the permission to ring doorbells and shout obscenities into the unwilling ears of householders. He is not convinced that "we can have freedom of religion only by denying the American's deep-seated conviction that his home is a refuge from the pulling and hauling of the market place and the street." [100] Supreme Court Justices do not have to answer doorbells and confront zealots denouncing their religion. "If each competing sect in the United States went after the householder by the same methods, I should think it intolerable." [101] In *Craig v. Harney*,[102] the Court held that Texas

[96] *Id.* at 639.

[97] *Id.* at 630.

[98] Jones v. Opelika, 319 U.S. 103 (1943), and related cases reported with it. Jackson's opinion appears in Douglas v. City of Jeannette, 319 U.S. 157, 166 (1943).

[99] Murdock v. Pennsylvania, 319 U.S. 105, 109 (1943).

[100] 319 U.S. at 181.

[101] *Id.* at 180. Jackson is sarcastic, after his wont, in his concurrence in Prince v. Massachusetts, 321 U.S. 158, 176 (1944), where the Court permitted Massachusetts to apply its child labor laws to a child accompanying its Jehovah's Witness guardian distributing pamphlets on the street at night.

[102] 331 U.S. 367 (1947).

could not punish as contempt attacks on a judge pendente lite — "the law of contempt is not made for the protection of judges who may be sensitive to the winds of public opinion. Judges are supposed to be men of fortitude, able to thrive in a hardy climate." [103] (Is the law of contempt made for the protection of "judges" or of litigants?) Replied Jackson, again with a touch of personal sarcasm, "From our sheltered position, fortified by life tenure . . . it is easy to say that this local judge ought to have shown more fortitude in the face of criticism." And then referring playfully to the fact that the American Newspaper Publishers Association had filed a brief amicus: "It is doubtful if the press itself regards judges as so insulated from public opinion . . . . This might be a good occasion to demonstrate the fortitude of the judiciary." [104] In *Saia v. New York* [105] the Court appeared to hold that a city could not restrict the use of sound trucks in public places — in this case a religious service by the Jehovah's Witnesses in a park. This, thought Jackson, made the "great right of free speech . . . ridiculous and obnoxious." [106] It deprived the public of the very enjoyments which parks are designed to serve.

The problem of limitation became more acute where the character of what was said threatened "evil." When the defendant made a speech in a packed hall denouncing to his "Fellow Christians" within the "slimy scum" who were "howling" and milling outside, Jackson thought Illinois had proved a clear case of "disorderly conduct." [107] In Nuremberg he had learned that

[103] *Id.* at 376.

[104] *Id.* at 397. There is no explanation of Jackson's vote in the earlier case of Bridges v. California, 314 U.S. 252 (1941). Here he made up a majority of five under the leadership of Justice Black in holding that a California court could not punish as contempt a telegram by Harry Bridges to the Secretary of Labor saying that if the court issued an injunction against his union it would "tie up the port of Los Angeles and involve the entire Pacific Coast." *Id.* at 276. This is one of the most uncharacteristic of Jackson's votes.

[105] 334 U.S. 558 (1948) (5–4 decision). In Kovacs v. Cooper, 336 U.S. 77 (1949) (5–4 decision), *Saia* was distinguished on the ground that the ordinance there had allowed unlimited discretion.

[106] 334 U.S. at 566. The majority spoke of "balancing" interests, to which Jackson replied, "Our only function is to apply constitutional limitations." *Id.* at 571. Yet in Douglas v. City of Jeannette, Jackson says, 319 U.S. at 178–79, "The real question is where their [Jehovah's Witnesses'] rights end and the rights of others begin. The real task of determining the extent of their rights on balance with the rights of others is not met by pronouncement of general propositions with which there is no disagreement."

[107] Terminiello v. Chicago, 337 U.S. 1, 13 (1949) (dissenting opinion). The

"cities and states should be sustained in the power to keep their streets from becoming the battleground for these hostile ideologies to the destruction and detriment of public order." "[F]reedom of speech exists only under law and not independently of it." "There is danger that, if the Court does not temper its doctrinaire logic with a little practical wisdom, it will convert the constitutional Bill of Rights into a suicide pact." [108]

Jackson begins to adumbrate in this decision a theory which departs from the doctrine he embraced in the flag salute case. There he said that the first amendment restrictions on Congress were specifically transmitted into the fourteenth as restrictions on the states.[109] In *Terminiello* he suggests that Congress, being the instrument of a new and experimental authority, remote from the people, was given limited power "to deal with a limited class of national problems" and so, it may be, no power to deal with abuses of speech. But the fourteenth "gave no notice to the people that its adoption would strip their local governments of power to deal with such problems of local peace and order as we have here." [110] A few years later he returned to the question in his dissent in *Beauharnais v. Illinois*.[111] In this case a majority upheld a conviction under a statute condemning race slander. The defendant had distributed in the streets of Chicago leaflets, in the form of a petition to the Mayor, which rallied the whites to protect their neighborhoods from encroachments by the Negroes — if persuasion, it said, would not arouse them, the "rapes, robberies, knives, guns and marijuana of the negro, SURELY

---

majority reversed the conviction on the ground that an instruction (to which no exception was taken) might have been construed as permitting conviction simply because the speech aroused "anger," invited public dispute, or brought about a condition of unrest. *Id.* at 5.

[108] *Id.* at 34, 31, 37.

Jackson dissented alone in Kunz v. New York, 340 U.S. 290 (1951). New York City had denied a license to make street corner addresses to a person who had persistently preached racial and religious hatred. The majority held that the ordinance under which the city acted allowed undefined and arbitrary denials. Jackson's very eloquent dissent says with typical irony, "I do not see how this Court can condemn municipal ordinances for not setting forth comprehensive First Amendment standards. This Court never has announced what those standards must be, it does not now say what they are, and it is not clear that any majority could agree on them." *Id.* at 308.

[109] West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 639 (1943).

[110] 337 U.S. at 28–29.

[111] 343 U.S. 250, 287 (1952).

WILL." [112] Jackson dissented, but only because Illinois had dispensed with the trial safeguards which had become customary in criminal libels, particularly jury trial of the issue of truth and of the issue of the right to comment on matters of public interest. He agreed that such utterances could be made criminal. The "liberty" of the fourteenth is not identical with the "freedom of speech" of the first. Congress, having limited powers of government, has less occasion to abridge speech than the states. They must have general power to govern their manifold concerns, in this case "the private right to enjoy integrity of reputation or the public right to tranquillity." [113]

It is a question whether this doctrine of a distinction between first and fourteenth amendment "liberty" adds much to Jackson's thought. It would seem just another way of expressing the doctrine that the state within its sphere — as is true of the United States within its sphere — can set limits to free speech necessary to the public order, or, as with the United States, to that part of the public order committed to its power.[114] It has been thought that in one field alone it might make a difference, and here Jackson has ignored it.[115] The first amendment forbids Congress to make a "law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ." In *Everson v. Board of Educ.* he dissented from a majority which permitted the state to provide free buses for parochial schools.[116] Since this aided the religious school, it was thus "an establishment." But why then, we may ask, is tax exemption not "an establishment"? This Jackson does not tell us.[117] In *Illinois ex rel. McCollum v. Board of Educ.*

[112] *Id.* at 276.

[113] *Id.* at 294. Justice Holmes in Gitlow v. New York, 268 U.S. 652, 672 (1925), had suggested that "liberty" as used in the fourteenth amendment may perhaps "be accepted with a somewhat larger latitude of interpretation than is allowed to Congress by the sweeping language that governs or ought to govern the laws of the United States."

[114] Jackson is among the Justices who are most opposed to Supreme Court control of state action under the fourteenth amendment. In addition to the cases discussed, and the criminal procedure cases, pp. 977–81 *infra*, there are his concurrence in *In re* Summers, 325 U.S. 561 (1945); his joining in the dissent in Winters v. New York, 333 U.S. 507, 520 (1948); his lack of sympathy with actions and prosecutions under the federal civil rights laws, see Collins v. Hardyman, 341 U.S. 651 (1951); Screws v. United States, 325 U.S. 91, 138 (1945) (concurrence in Justice Frankfurter's dissenting opinion).

[115] See Note, 67 HARV. L. REV. 1016, 1020 (1954).

[116] 330 U.S. 1, 18 (1947).

[117] In *Everson* the dissent gained force from the fact that it was only the parochial schools, apart from public schools, which in fact received the aid.

the Court held invalid the release of school children from classes to attend sectarian religious instruction on school premises. Jackson in a concurrence avowed that he found no compulsion in this scheme nor any use of taxpayers' money. He concurred, nevertheless, because it went "beyond permissible limits." [118] Apparently his touchstone was still the "establishment" of the first amendment rather than the "liberty" of the fourteenth. In *Zorach v. Clauson* [119] a majority upheld released time for off-premises sectarian instruction. Jackson dissented. Now, however, he was able to find the interference with fourteenth amendment "liberty" which in *McCollum* he had been unable to find. He was, perhaps, conscious of a compulsion to conform to his *Beauharnais* doctrine which he had announced on the same decision day. School was thus made "a temporary jail for a pupil who will not go to Church. It takes more subtlety of mind than I possess to deny that this is governmental constraint in support of religion." [120] In these cases, with their curious shift of ground and uncertain analysis, there is a lack of his usual frankness. Some ill-defined current of feeling is checked by the dam of doctrine and can find no opening. Perhaps in forcing the child to select between religion and arithmetic he hears a subtle echo of the coerced salute. It may be that he feared social havoc from the disintegration of the classroom along racial and religious fault lines. His German experience warned him of these dangers. In *Terminiello*, *Saia*, and *Beauharnais* he had upheld the power of the state to preserve the very unity which was now being threatened. He might believe that he was justified in protecting the state from its inability to resist a league of minorities.

He was not, however, insensitive to the state's interest in the area of religious education. His implied solution is a recognition of religious values on a nonsectarian basis in the school itself. He made clear in *McCollum* that the state has a legitimate interest in teaching and preserving the religious tradition. "[N]early everything in our culture worth transmitting, everything which gives meaning to life, is saturated with religious influences . . . . One can hardly respect a system of education that would leave the student wholly ignorant of the currents of religious thought that move the world society for a part in which he is being pre-

[118] 333 U.S. 203, 237 (1948).
[119] 343 U.S. 306 (1952).
[120] *Id.* at 324.

pared." [121] He would not have the Court act as "a super board of education for every school district in the nation" or else the "wall of separation between church and state" will become "as winding as the famous serpentine wall designed by Mr. Jefferson [the chief architect also of the "wall of separation"] for the University he founded." [122] These views may explain his opinion for the Court in *Doremus v. Board of Educ.*[123] This was a proceeding by a school child and her parent to declare invalid a New Jersey statute providing for the opening of each school day with Old Testament reading. The appeal to the Supreme Court was dismissed: the child (who, in any case, had now graduated), said Jackson rather curtly, was not compelled either to accept what was read or listen if she chose to be excused. Nor was it alleged that Bible reading increased taxes.

The severest test of doctrine in the free speech area arose in *Dennis v. United States.*[124] Eleven top Communist leaders were indicted for "conspiring" "to advocate and teach the duty and necessity of overthrowing and destroying the Government of the United States by force and violence." It will be seen at once that the indictment did not charge a conspiracy to overthrow, or to sabotage, or to engage in other criminal acts, but rather "to advocate and teach." The Supreme Court had, though in a very general way, become by this time committed to the concept first announced by Mr. Justice Holmes in *Schenck v. United States* that speech was immune from control unless it created a "clear and present danger" of "substantive evils that Congress has a right to prevent." [125] The trial judge ingeniously, if verbally, solved the inevitable failure to prove a danger of immediate overthrow by putting to the jury the question whether the defendants intended overthrow "as speedily as circumstances would permit." [126] The conviction was upheld by the Supreme Court, the majority being made up in part of judges who accepted this as an apt formulation of "clear and present danger," in part of judges who either reformulated or rejected the notion.

The heaviest criticism brought against the decision has been that the court of appeals, speaking through Judge Learned

[121] 333 U.S. at 236.
[122] *Id.* at 237, 238.
[123] 342 U.S. 429 (1952).
[124] 341 U.S. 494 (1951).
[125] 249 U.S. 47, 52 (1919).
[126] United States v. Foster, 9 F.R.D. 367, 391 (S.D.N.Y. 1949).

Hand,[127] and the Supreme Court sustained the conviction not on the ground of advocacy as laid in the indictment but on the ground that the Communist Party is a conspiracy presently to overthrow the Government, or to engage in sabotage and other criminal tactics. This if proved would be criminal regardless of immediate danger; but it is argued that it was neither charged in the indictment nor proved at the trial. Jackson, as did Hand, characterized the Communist Party by taking judicial notice of it as an organization "rigidly disciplined," having "no scruples against sabotage, terrorism, assassination, or mob disorder," and subject to control by a foreign government. He relied heavily, as did Hand, on Czechoslovakia as proof of intent and probability.[128] Whether these inferences went beyond what was shown at the trial we do not know because unfortunately the Supreme Court limited its review to the law, a questionable procedural decision considering how enmeshed here were the law and the facts. But assuming that these inferences are supported by the record and by facts judicially noticeable, the case is one of a force in being ready to strike, awaiting its opportunity, but, in the nature of the situation, at a time which cannot be known. Such a showing may perhaps fall short of a conspiracy to overthrow the Government. Yet a conspiracy to advocate may under such conditions constitute a danger which, if uncertain, is so menacing as to be constitutionally punishable. It was such a conspiracy that the statute condemned and the Government in the Court's view was thus justified in not undertaking the possibly heavier burden of proving a conspiracy to overthrow.[129]

Jackson in his concurrence makes an interesting attempt to reformulate the clear and present danger test. It cannot be used, he believes, in a case such as this. "We would have to foresee and predict the effectiveness of Communist propaganda, opportunities for infiltration, whether, and when, a time will come that they consider propitious for action, and whether and how fast our existing government will deteriorate. . . . No doctrine can be sound whose application requires us to make a prophecy of that sort in the guise of a legal decision." [130] It seems, however, to

[127] United States v. Dennis, 183 F.2d 201 (2d Cir. 1950).

[128] 341 U.S. at 564, 566. He similarly described the Communist Party in American Communications Ass'n v. Douds, 339 U.S. 382, 422 (1950).

[129] See the animadversions on this position in Wormuth, *Learned Legerdemain: A Grave But Implausible Hand*, 6 WEST. POL. Q. 543 (1953).

[130] 341 U.S. at 570.

be implied in his recital of the Communist threat that to justify suppression, the "conspiracy" must at least threaten serious if imponderable dangers, though in a later part of his opinion he comes dangerously near to suggesting that any "conspiracy" is punishable: "The Constitution does not make conspiracy a civil right." [131] He goes on to state that the Holmesian test unmodified should be saved for application in the kind of case for which it was devised, for cases in which "it is not beyond the capacity of the judicial process to gather, comprehend, and weigh the necessary materials for decision whether it is a clear and present danger of substantive evil or a harmless letting off of steam." [132] It may well be that Holmes and Brandeis never applied their test to a case such as *Dennis* — a question I shall postpone for the moment. But the advocacy of criminal syndicalism by Gitlow and his Socialist Party which Holmes and Brandeis would have tolerated was much more than "a harmless letting off of steam."

In summing up Jackson's position I would maintain the thesis that in all of these decisions he was holding to the traditional position of free speech in our legal system. He restates that position for the current scene with characteristic conviction, vigor, and brilliance. But he refuses to put free speech on a new, more

[131] *Id.* at 572. "What really is under review here is a conviction of conspiracy, after a trial for conspiracy, on an indictment charging conspiracy, brought under a statute outlawing conspiracy." *Ibid.* He admits that conspiracy is "an awkward and inept remedy," *id.* at 577, but can find no constitutional authority for taking it away from the Government.

This insistence is in reply to Justice Douglas who said in his dissent, *id.* at 584, "The doctrine of conspiracy has served divers and oppressive purposes and in its broad reach can be made to do great evil. But never until today has anyone seriously thought that the ancient law of conspiracy could constitutionally be used to turn speech into seditious conduct."

At this Jackson jibes that Douglas has had no hesitancy in applying conspiracy doctrine under the antitrust laws. *Id.* at 572, 574, 576.

Jackson himself in another mood and context has written brilliantly of the dangers and abuses (though primarily those of a procedural character) in the criminal law of conspiracy. Krulewitch v. United States, 336 U.S. 440, 445 (1949). In that case he quotes Cardozo concerning the "'tendency of a principle to expand itself to the limit of its logic.'" *Id.* at 445. Jackson, as is true of most judges, relies as the need arises, on the notion of the dangerous tendencies of a doctrine ("great oaks from little acorns grow"), or, *per contra*, on the notion that the Court can and will draw the line at any excessive manifestation of a power ("the power to tax is not the power to destroy as long as this Court sits").

[132] 341 U.S. at 568.

Thomas v. Collins, 323 U.S. 516, 544 (1945), where Jackson concurred in a majority decision holding that a state could not require a license to address a union meeting, is perhaps, for Jackson, a case where the clear and present danger test is capable of being applied.

exalted, and absolute level. The attack on civil liberties could in his opinion be better met, not by expanding them, but by rallying around a popular, widely accepted position. The minority would deny that his conceptions were traditional. In the *Dennis* case they cite the absolute phrases of the Constitution: "Congress shall make no law . . . abridging the freedom of speech." [133] They quote the words of the great libertarian publicists.[134] "The Constitution," says Justice Douglas, "provides no exception." "To make a lawful speech unlawful because two men conceive it is to raise the law of conspiracy to appalling proportions. That course is to make a radical break with the past and to violate one of the cardinal principles of our constitutional scheme." [135] But if judged by the actual legal situations, the statutes, and the common law ("the law in action and not in books"), Jackson's position, even in the *Dennis* case, does not "make a radical break with the past," whatever one might insist was wisdom for the future.

As to the cases involving state action, we must remember that it was not until 1925 that first amendment limitations were "incorporated" into the fourteenth.[136] The states themselves since the beginning of the Republic had sustained statutes and applied common law directed against criminal libel, contempt by publication, inciting to riot, disturbance of the peace, obscenity and slander, all of which involved limitations on speech. It was not until the forties that these exercises of power were even seriously called into question by the Supreme Court. The state and federal sedition laws had been more controversial but even these had been for the most part sustained. The clear and present danger test itself was first announced by Holmes to sustain convictions for attempting to obstruct recruitment and cause insubordination in the military.[137] Holmes and Brandeis did urge the test in dissent in *Gitlow v. New York*.[138] The Court there upheld conviction of a leader of a revolutionary socialist party for advocating syndicalism — the overthrow of government by force. The conviction rested on the publication of a manifesto calling

---

[133] 341 U.S. at 590.

[134] As does Brandeis in Whitney v. California, 274 U.S. 357, 372, 375–77 nn.2–4 (1927).

[135] 341 U.S. at 590, 584.

[136] Gitlow v. New York, 268 U.S. 652 (1925).

[137] Schenck v. United States, 249 U.S. 47 (1919).

[138] 268 U.S. 652, 672–73 (1925).

upon the industrial masses to broaden the strike against capitalism and to overthrow the bourgeois parliamentary state by class action in any form. The defendant had cited recent strikes as instances of a developing revolutionary movement. In the similar case of *Whitney v. California* Holmes and Brandeis had concurred specially because of evidence of a conspiracy to commit serious crimes, though none of the judges state what the evidence was.[139] The only important application of their test to a case of organized revolutionary action is *Herndon v. Lowry*.[140] Herndon, a Negro organizer for the Communist Party, was convicted of attempting to cause insurrection by organizing combinations of white and colored persons and inciting them to riots. It was shown that he had Communist literature in his room calling on members of both races to seek equality by violent revolution. He had addressed three meetings, and possessed a membership book. That was all the evidence. There was no evidence of distribution of literature, nothing concerning the content of his speeches or the general course of his activity. Mr. Justice Roberts, speaking for the majority in reversing the conviction, distinguished *Gitlow* as a case where the legislature had explicitly decided that syndicalism was a danger to the state. His general position was somewhat less precisely limiting than the Holmesian test: "The power of a state to abridge freedom of speech and of assembly is the exception rather than the rule and the penalizing even of utterances of a defined character must find its justification in a reasonable apprehension of danger to organized government." [141] This case, decided as late as — and as early as — 1937 is almost the only one in which a majority could be mustered to immunize from punishment the organized teaching of revolutionary overthrow; [142]

[139] 274 U.S. 357, 372 (1927).

[140] 301 U.S. 242 (1937) (5–4 decision).

[141] *Id.* at 258.

[142] *Cf.* CHAFEE, FREE SPEECH IN THE UNITED STATES 388–98 (1941). Professor Chafee, with a note of irony, suggests that Herndon was the one defendant in the whole series of syndicalism cases whose conviction might have appropriately been sustained. The literature found in his room did call for immediate Negro insurrections. But Chafee points out in support of the decision that the conviction was under an old (1832) statute aimed at slave rebellions, which under the interpretation given it by the state supreme court made conduct intending insurrection "at any time" criminal, and that violation carried the death penalty, absent a jury recommendation of mercy which would reduce the penalty to 5 to 20 years. Herndon was given 18 to 20 years. Chafee feels that the Supreme Court could not tolerate so savage a law.

and no one, I think, could contend that it comes near to being an authority against *Gitlow* or *Dennis*. "Clear and present danger" had become accepted as part of the canon. It had, as Jackson suggests, been applied when the "evil" threatened by speech was of a precise and limited nature [143] such that its immediacy could be determined by the judges. Holmes and Brandeis were prepared to carry it further. But no body of decisions made the test a necessary condition in all cases, particularly in cases such as *Dennis*.[144]

In my opinion, Jackson's view is not only traditional but sound constitutional doctrine. The minority had thrown the tradition on the defensive by pitching the whole case for free speech on the right to organize revolutionary propaganda. Because we are encouraged to tolerate wrong, hateful, and even "dangerous" *ideas* and *opinions*, the conclusion is subtly suggested that only when speech is the vehicle of organized revolutionaries is it "dangerous" enough to make its protection significant. Protection of the vast range of discussion short of revolutionary propaganda is taken for granted as a petty, unheroic thing. This protection is so well established that no more than the presence of the courts is needed to maintain it. It offers no opportunity for new judicial doctrine or impassioned credos. Yet free speech performs superlative functions when it keeps open the road for personal expression of thought and belief, however "dangerously" unorthodox, and for organized propaganda creating the necessary public opinion for peaceful change. A state could no doubt pro-

[143] See, *e.g.*, Craig v. Harney, 331 U.S. 367 (1947); Bridges v. California, 314 U.S. 252, 260–63 (1941).

[144] However, in the *Dennis* case, Chief Justice Vinson for himself and Justices Reed, Burton, and Minton, appeared to hold that "the clear and present" danger test was both applicable and satisfied. "Clear and present danger" in their view was a question of degree depending on the magnitude of the danger, following Hand, who had said below: "In each case they [courts] must ask whether the gravity of the 'evil,' discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger." 183 F.2d at 212. Chief Justice Vinson described the situation as "the development of an apparatus designed and dedicated to the overthrow of the Government, in the context of world crisis after crisis." It was then enough if in such a context defendants intended to strike "as speedily as circumstances would permit." 341 U.S. at 510. The context of Holmes' test was the law of attempt. It is doubtful if clarity of comprehension is advanced by holding that such facts constitute a "clear and present" danger of attempted revolutionary overthrow. It may be true, however, that Holmes — as Jackson thought — would have been willing to hold that where the danger is paramount and its occasion incalculable, the clear and present danger test is inapt. See p. 973 *supra*.

tect organized revolutionary utterance but there is little in our history to show that our failure to do so has impaired the vital functions of free speech.

Finally let us examine Jackson's reaction to two problems which arise in the detection and proof of crime. He has been, with Mr. Justice Frankfurter, in the forefront of those who would give the most thoroughgoing effect to the fourth amendment prohibition against unreasonable search and seizure.[145] Yet he has been the boldest and most vigorous opponent of federal review of confessions in state trials. These two reactions have sometimes appeared contradictory. He would exclude evidence obtained in violation of the fourth amendment though the defendant is "frequently . . . guilty."[146] This does not "disturb" him "in spite of its unfortunate consequences on law enforcement." In the same volume of the reports, dissenting in *Watts v. Indiana* [147] from the exclusion of a confession, he says that the Bill of Rights "contain[s] an aggregate of restrictions which seriously limit the power of society to solve such crimes as confront us in these cases. Those restrictions we should not for that reason cast aside, but that is good reason for indulging in no unnecessary expansion of them." [148]

In *Brinegar v. United States*,[149] the police were allowed to search a bootlegger's automobile on suspicion. Dissenting, Jackson said, "Uncontrolled search and seizure is one of the first and most effective weapons in the arsenal of every arbitrary government. And one need only briefly to have dwelt and worked among a people possessed of many admirable qualities but deprived of these rights to know that the human personality deteriorates and dignity and self-reliance disappear where homes, persons and possessions are subject at any hour to unheralded search and seizure by the police." "So a search against Brinegar's car must be regarded as a search of the car of Everyman." [150]

The *Brinegar* and *Watts* opinions do help us, however, to understand why Jackson sees Everyman at the wheel of Brinegar's

---

[145] See his concurring opinion in McDonald v. United States, 335 U.S. 451, 457 (1948), and dissent in Harris v. United States, 331 U.S. 145, 195 (1947).

[146] Brinegar v. United States, 338 U.S. 160, 181 (1949) (dissenting opinion).

[147] 338 U.S. 49 (1949). Jackson in fact concurred in this case but wrote an opinion explaining his dissent in two other cases argued with it. *Id.* at 57.

[148] *Id.* at 61.

[149] 338 U.S. 160 (1949).

[150] *Id.* at 180–81.

car but not in the little room in the police station where Watts sits, under floodlights, undergoing his agony. In the vein of *Beauharnais* he notes that the fourth amendment was directed against the central government's agencies. "Local excesses or invasions of liberty are more amenable to political correction." [151] Here as in his free speech opinions we have the traditional attitude. The fourth amendment reflects, of course, one of the most passionate quarrels of the Revolution and it is quite true that, at least in 1776, the ordinary citizen saw himself as the possible victim of the general warrant. For Jackson this position had acquired a reinforced validity because, I suspect, he associated the central government and the search with the excesses of regulation. In *Endicott Johnson Corp. v. Perkins* [152] he wrote an opinion allowing the broadest subpoena powers to the administrative. But in later years he became uneasy. In *Shapiro v. United States* [153] the Court permitted the OPA to designate as "public" all the books and records of an entrepreneur. As "public" they were subject to subpoena despite a claim of privilege against self-incrimination. "Of course," says Jackson caustically, the decision "strips of protection only business men and their records; but we cannot too often remind ourselves of the tendency of such a principle, once approved, to expand itself in practice 'to the limits of its logic.' " [154] In *Brinegar* he says that he would favor the police, if he could, in crimes of great viciousness: in a case of kidnapping he would strive to allow "a roadblock about the neighborhood and [a] search [of] every outgoing car . . . ." "But I should not strain to sustain such a roadblock and universal search to salvage a few bottles of bourbon and catch a bootlegger." [155] In forced confession cases Jackson's emotional "tone" is very different and decidedly in conflict with that of most of the other judges who have expressed themselves. Justice

---

[151] *Id.* at 181.

In which category is On Lee v. United States, 343 U.S. 747 (1952)? Here a stool pigeon entered the place of his "friend," On Lee, carrying a concealed microphone wired to the police waiting out-of-doors. On Lee made damaging admissions. Writing for the majority, Jackson refused to exclude the admissions. The conduct of the authorities did not have for him the vice of a "search."

[152] 317 U.S. 501 (1943).

[153] 335 U.S. 1 (1948).

[154] *Id.* at 70.

[155] 338 U.S. at 183. He expresses a similar attitude of scorn toward excessive zeal in the enforcement of gambling laws. McDonald v. United States, 335 U.S. 451, 459 (1948).

Douglas would disallow every confession secured after arrest and before arraignment. Only so, in his opinion, can the police be compelled to fulfill the statutory right of the accused to be brought immediately before a magistrate; only so can the evil of the involuntary confession be avoided.[156] Justice Frankfurter holds that "a confession by which life becomes forfeit must be the expression of free choice. . . . [I]f it is the product of sustained pressure by the police it does not issue from a free choice." It is for the jury to resolve disputes as to what happened but the Court will determine for itself whether the admitted circumstances amount to "a calculated endeavor to secure a confession through the pressure of unrelenting interrogation." [157]

Jackson's opinion in the *Watts* case is remarkable for its brevity, its pith, and its frankness. In each of the three cases there was, he notes, a brutal unwitnessed murder, and the killer alone possessed the solution. In each there was reasonable ground to suspect an individual but insufficient evidence to charge him with guilt. Interrogation extended over varying periods. Each confession was verified and corroborated by other evidence. To reject the confession "is a grave choice for a society in which two-thirds of the murders already are closed out as insoluble." [158] His answer to Frankfurter's position he had earlier formulated in *Ashcraft v. Tennessee*: "A confession is wholly and incontestably voluntary only if a guilty person gives himself up to the law and becomes his own accuser. The Court bases its decision on the premise that custody and examination of a prisoner for thirty-six hours is 'inherently coercive.' Of course it is. And so is custody and examination for one hour." [159] Therefore either one excludes all confessions gained prior to arraignment — Douglas' view — or leaves it to the state courts and juries to decide whether the length of custody was made reasonably necessary by the facts of the particular case. Frankly he concedes in the *Watts* opinion that this "largely negates the benefits of the constitutional guaranty of the right to assistance of counsel," [160] at least in the sense of securing the maximum aid in concealment; it puts the

[156] See, *e.g.*, his opinion in Watts v. Indiana, 338 U.S. 49, 56–57 (1949).

[157] *Id.* at 53, 54.

[158] *Id.* at 58.

[159] 322 U.S. 143, 161 (1944). In this case Justice Frankfurter had concurred in Jackson's dissent.

[160] 338 U.S. at 59.

defendant at the mercy of the facts. The opinion concludes on a note of intellectual distress. The people must, he says, see "their police stand by helplessly while those suspected of murder prowl about unmolested. Is it a necessary price to pay for the fairness which we know as 'due process of law'? . . . I do not know the ultimate answer to these questions; but, for the present, I should not increase the handicap on society." [161]

Justice Frankfurter believes that "brutal methods of law enforcement are essentially self-defeating." [162] In a later case he quotes William Temple to the effect that the influence of the state is chiefly in "the moral qualities which it exhibits in its own conduct." "To approve legally," the Justice says, "what we disapprove morally, on the ground of practical convenience, is to yield to a short-sighted view of practicality." [163] I am not sure how Jackson would answer these arguments. He might reply that the law itself has in it a significant ingredient of force and that where faced with the mortal force of murder, society may choose the confession in question as the lesser evil. The proposition that on balance forced interrogation increases the sum total of lawlessness and brutality would be one which Jackson probably did not believe to be verified or verifiable by experience. He did in a later case state that as far as he could see the Court's avowed purpose to discourage illegal methods of securing proof had not been successful.[164]

Jackson thus identified Everyman with the victim of the unreasonable search and seizure. It is a threat to normal privacy. It is to him the historic symbol of governmental aggrandizement. Its use and abuse occur primarily in cases of minor crime. He does not identify Everyman with the usual third-degree victim. The third degree came before the Court almost always in cases of murder. We have seen that Jackson is at bottom the man of common sense and average good will. It is more than such a man can bear that a trial of the defendant for murder should become a trial of the district attorney for use of the third degree. In *Stein v. New York* [165] Jackson quotes with obvious horror from the summation to the jury of defendant's counsel:

---

[161] *Id.* at 61–62.

[162] *Id.* at 55.

[163] On Lee v. United States, 343 U.S. 747, 758 (1952).

[164] Irvine v. California, 347 U.S. 128, 135 (1954).

[165] 346 U.S. 156 (1953), *The Supreme Court, 1952 Term*, 67 HARV. L. REV. 91, 118.

I don't care whether Cooper is innocent or guilty, that is insignificant in the solution of the fundamental problem as to whether the state troopers and other enforcing authorities themselves have violated far more fundamental principles. . . .

Don't narrow yourselves into a mere solution of a petty murder. . . . Of course, we want a solution to that, but that is secondary, if the solution of that means that you are going to weaken the very foundations of the republic. . . .[166]

One feels Jackson's boiling anger that such an argument — crude and ludicrous parody that it is — should come so near being approved doctrine.

Jackson, perhaps even more than Justice Frankfurter, believed that interference with state action under the fourteenth amendment should be sparing. This was apparent in the free speech cases. His views on state criminal procedure were similar.[167] But the attitude only partly explains his opinion on forced confessions. There is, I think, little doubt that he was not in sympathy with the progressive refinement of rules protecting criminal defendants.[168] He probably believed that the Court was making a fetish of procedural protection at the expense of law enforcement.

---

[166] 346 U.S. at 166.

[167] This is reflected in his antipathy to the enforcement of the Civil Rights Act. See note 114 *supra*. His irritation with federal interference in state criminal administration is expressed with all his eloquence, wit, and sarcasm in his concurrence in Brown v. Allen, 344 U.S. 443, 532 (1953). See also his clever dissent in Price v. Johnston, 334 U.S. 266, 295 (1948), where the lower court was reversed for refusing to try a fourth application for a writ of habeas corpus. This, says Jackson, is one of a line of cases putting into the hand of "the convict population . . . new and unprecedented opportunities to re-try their cases, or to try the prosecuting attorney or their own counsel . . . ." *Id.* at 301. Though he would exclude the fruits of an illegal search and seizure from a federal trial, he would not compel the state courts to follow the exclusionary rule even though the search was held to be in violation of due process. Irvine v. California, 347 U.S. 128 (1954).

In Cassell v. Texas, 339 U.S. 282 (1950), the Court applied its usual rule invalidating a state conviction where Negroes had been excluded from the grand jury. Jackson alone dissented because the state's action did not prejudice the defendant, and because there were other ways of enforcing nondiscrimination. *Id.* at 300–04. In Fay v. New York, 332 U.S. 261 (1947), Jackson for the majority upheld the New York "blue ribbon jury" against claims that it was deliberately chosen of middle-class citizens in order to insure a bias toward conviction. See also Gayes v. New York, 332 U.S. 145 (1947); Foster v. Illinois, 332 U.S. 134 (1947); Louisiana *ex rel.* Francis v. Resweber, 329 U.S. 459 (1947).

[168] Thus he did not particularly favor the principle of McNabb v. United States, 318 U.S. 332 (1943), a rule of federal criminal law excluding confessions

III. Roots of Philosophy

Jackson's philosophy of judging transmutes into ideal terms the philosophy of a practicing lawyer, a lawyer such as he had been in Jamestown, New York, later in Albany, and finally in Washington. His year in Nuremberg (on leave from the Court) as chief prosecutor of the German war criminals added a dimension to his experience which influenced his views on "civil liberties." Jamestown was a city, yet small enough to have enabled him to serve every interest and to know the leaders of every group. He was sympathetic to his clients, most of whom were inevitably men of business and industry, though he was too self-assured, too clear-headed ever to have been their mere apologist. He was from the beginning of his career a leader of the organized bar — city, county, state, national — intensely proud of his skill and convinced of the pre-eminent mission of his calling. In *Hickman v. Taylor*,[169] a plaintiff in advance of trial sought to elicit from defendant's counsel records of all questions and answers put to witnesses, oral as well as written. In a concurrence, Jackson, drawing on his experience as a trial lawyer, pictures vividly the predicament of an attorney compelled to supply such records. If a witness later told a different story the lawyer "would find himself branded a deceiver afraid to take the stand . . . or else he will have to go on the stand to defend his own credibility . . . ." [170] "[I]t too often is overlooked that the lawyer and the law office are indispensable parts of our administration of justice. Law-abiding people can go nowhere else to learn the ever-

secured after a failure to bring the accused before a magistrate though there is no evidence of coercion. He would have limited its application to cases of "psychological pressure." See dissent of the four Justices in Upshaw v. United States, 335 U.S. 410, 429 (1948).

On the other hand, where the procedure was radically wanting in fairness, as in some of the immigration and security cases, Jackson's condemnation has been blistering. See Shaughnessy v. United States *ex rel.* Mezei, 345 U.S. 206, 219 (1953) (dissenting opinion):

This man, who seems to have led a life of unrelieved insignificance, must have been astonished to find himself suddenly putting the Government of the United States in such fear that it was afraid to tell him why it was afraid of him.

See also United States *ex rel.* Knauff v. Shaughnessy, 338 U.S. 537, 551 (1950) (dissenting opinion): "Security is like liberty in that many are the crimes committed in its name." See also Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 183 (1951).

[169] 329 U.S. 495 (1947).

[170] *Id.* at 517.

changing and constantly multiplying rules by which they must behave and to obtain redress for their wrongs." [171]

Jackson translated his experience into two major postulates of judging. First he insisted that the judges should strive toward a law that was workable, a law that the lawyer and his client could know and apply with assurance. Clarity and simplicity were worth more to him than the intellectual sufficiency of doctrine. Second, he sought always for neutrality; he had become the arbiter in the city of his friends and he was willing to believe that they were all agreed, indeed insistent, on this condition of neutrality. It was not that he closed his eyes to the conflict of class and of interest, but that he thought that these were best solved by legislation.

It is instructive to compare Holmes and Jackson on the subject of the certainty of the law as a guide to action. Holmes, the observer, was fascinated by the trend of the law to impose obligations based on the "objective" standard of the "reasonable man." Upholding the Sherman Act against the charge of uncertainty he replied, "[T]he law is full of instances where a man's fate depends on his estimating rightly, that is, as the jury subsequently estimates it, some matter of degree." [172] And he adds with a note of that almost callous satisfaction that a philosopher may experience in confronting the brutalities of life, "[I]f his judgment is wrong, not only may he incur a fine or a short imprisonment as here; he may incur the penalty of death." [173] This attitude may be tolerated as the luxury of an age still slothfully sentimental, still at peace. But ours is a time of cruel uncertainties and uncertain cruelties, in which a lawyer responsible for men's affairs cannot exult. To Jackson these are evils to be mitigated, rather than occasions for philosophic complacency.

In *Boyce Motor Lines, Inc. v. United States*, [174] the ICC provided that in transporting explosives the driver of a motor vehicle should avoid "so far as practicable, and, where feasible," driving into "congested" areas.[175] The statute made knowing violation of

[171] *Id.* at 514–15.

[172] Nash v. United States, 229 U.S. 373, 377 (1913).

[173] *Ibid.* In this connection Holmes cites his own opinion in Commonwealth v. Pierce, 138 Mass. 165 (1884), in which he forces the note of criminal liability based on the so-called "objective" standard.

[174] 342 U.S. 337 (1952).

[175] 49 C.F.R. § 197.1(b) (1949).

such regulations a crime.[176] The Court upheld the regulation, but Jackson thought that the ICC had failed in the very purpose of administrative action, which was to translate broad delegations into definite rules. This vague regulation, in his opinion, stood in the way of "intelligible" and "tight" regulation, possibly by state or local rule.[177] In his dissent in *FTC v. Ruberoid Co.*[178] he expanded the same theme into an extensive essay. In that case the Court permitted the FTC to enjoin price discrimination in an order which did no more than repeat the general words of the statute. It is the duty of a regulatory commission, argued Jackson, to transmute policy into "guiding yardsticks." [179] Perhaps his boldest attempt along this line was his dissent in *Jordan v. De George.*[180] An alien had been convicted of defrauding the United States of taxes on distilled spirits. Was this a "crime involving moral turpitude" so as to make him deportable? Yes, said the Court. But Jackson refused to answer the question. The standard, he insisted with considerable force, wit, and ingenuity, was too vague for judicial administration, this despite the fact that the courts had been administering it for sixty years! "The chief impression from the cases," he argues, "is the caprice of the judgments. How many aliens have been deported who would not have been had some other judge heard their cases, and vice versa, we may only guess. That is not government by law." "So far as this offense is concerned with whiskey, it is not particularly un-American, and we see no reason to strain to make the penalty for the same act so much more severe in the case of an alien 'bootlegger' than it is in the case of a native 'moonshiner.' I have never discovered that disregard of the Nation's liquor taxes excluded a citizen from our best society and I see no reason why it should banish an alien from our worst." Deportation "is a savage penalty and we believe due process of law requires standards for imposing it as definite and certain as those for conviction of crime." [181]

In *SEC v. Chenery Corp.*[182] Jackson returns in high dudgeon to the theme of predictability. The Holding Company Act, it

[176] 18 U.S.C. § 835 (1952).
[177] 342 U.S. at 345–46.
[178] 343 U.S. 470, 480 (1952).
[179] *Id.* at 482.
[180] 341 U.S. 223, 232 (1951).
[181] *Id.* at 239–40, 241, 243.
[182] 332 U.S. 194 (1947).

will be recalled, empowered the SEC to dissolve public utility holding companies, reorganize so much of their properties as could be integrated into a single territorial system, and compel sale of the remainder.[183] The company by its managers might, if it could, negotiate a voluntary reorganization plan with the Commission.[184] The Chenerys, managers of such a company, while negotiating with the Commission learned that in the Commission's opinion their own stock did not have sufficient equity to participate in the reorganized company. Accordingly, in order to retain their managerial stake in the enterprise, they purchased senior securities in the open market; but the Commission, allowing them their purchase price plus four per cent, compelled them to surrender the shares to the company. The SEC reasoned that managers, if permitted to trade in securities, might delay or manipulate the reorganization. The Commission exercised this power under a provision which required it to disapprove a plan incompatible with the protection of investors.[185] The SEC had never by rule or intimation indicated disapproval of such conduct and did not now propose an absolute rule against manager trading. The majority held that the decision was within the realm of commission expertness.[186] A regulation, the Court said, would have been preferable but *ad hoc* decision might be justi-

[183] § 11, 49 STAT. 820 (1935), 15 U.S.C. § 79k (1952).

[184] § 11(e), 49 STAT. 822 (1935), 15 U.S.C. § 79k(e) (1952).

[185] § 11(b), 49 STAT. 821 (1935), 15 U.S.C. § 79k(b) (1952).

[186] The ruling had already been once reviewed by the Supreme Court. SEC v. Chenery Corp., 318 U.S. 80 (1943). Initially the Commission had rested its order on the notion that at common law corporate directors were trustees for the corporation during reorganization to the extent that they could not buy the corporation's securities for their own interest. The Court, speaking through Justice Frankfurter in an opinion in which Justice Jackson concurred, did not agree with this view of the common law. "Had the Commission, acting upon its experience and peculiar competence, promulgated a general rule" the case would have been different. *Id.* at 92. There were no findings, however, continued the Court, to show that the purchases were detrimental to the public interest or the interest of investors. The proceedings were remanded. "All we ask of the . . . [SEC] is to give clear indication that it has exercised the discretion with which Congress has empowered it." *Id.* at 94–95.

Quaere: Under the remand could the SEC condemn the transaction without a pre-existing regulation? If the remand was ambiguous, so was the subsequent conduct of the SEC. It never held that the Chenerys had acted unfairly, but it intimated that they had delayed the reorganization so as to assure their stake in the new enterprise. The Commission did not so much make a finding to this effect as it used it by way of example of potential misuse of power. At the same time it refused to issue a general regulation against manager trading on the ground that it was not administratively feasible.

fied "in formulating new standards." The consequent "retroactivity" was the unfortunate price of a novel decision, but had to be balanced against the toleration of conduct contrary to the statutory design.

Jackson's expression of indignation was savage. Pouring scorn on the Court's reliance on commission expertness, he said:

"The Court's reasoning adds up to this: The Commission must be sustained because of its accumulated experience in solving a problem with which it had never before been confronted!" The Court, he went on, admits to "retroactivity" in the formulation of a "new standard" and yet justifies it on the ground that the condemned conduct was contrary to the statutory design. "I give up. Now I realize fully what Mark Twain meant when he said, 'The more you explain it, the more I don't understand it.'" This is "administrative authoritarianism . . . power to decide without law . . . ." "This decision is an ominous one to those who believe that men should be governed by laws that they may ascertain and abide by, and which will guide the action of those in authority as well as of those who are subject to authority." [187]

Closely related to Jackson's demand for predictability was his conscious effort to achieve neutrality on social issues. During his tenure the Court divided persistently in cases applying the Fair Labor Standards Act's wage and hour provisions, and in cases involving employees' personal injuries. A group of four judges, comprising Justices Black, Douglas, Murphy, and Rutledge, applied themselves with undeviating zeal to working out recoveries for plaintiffs in these cases. Where they prevailed a fifth, sixth, or seventh vote would come from the remaining group — Reed, Jackson, Frankfurter — with Stone and Roberts, perhaps, the least likely to be in the majority. These divisions gave rise to strong feeling, particularly on the part of Jackson, who in these cases, as in many others, looked upon Justice Black as the mind and heart of an opposition party. The difference broke out into open warfare in *Jewell Ridge Coal Corp. v.*

[187] 332 U.S. at 213, 214, 216, 217.

Jackson's caricature of the majority opinion is, I think, unfair. There is no contradiction in the idea of "experts" working out new standards of law; it is, indeed, a commonplace of administrative power. The "expertness" is in the understanding and analysis of the problems; this stage of expert activity precedes the formulation of new law. The majority might, of course, have held that under all the circumstances it was an "abuse of discretion" not to promulgate a regulation or in some way give warning. *Cf.* NLRB v. Guy F. Atkinson Co., 195 F.2d

Local 6167, United Mine Workers.[188] It was in this case that Jackson, unjustifiably, it would seem, implied that Black was disqualified because a former law partner of his was of counsel for the union.[189] The Fair Labor Standards Act provides a minimum hourly wage for work performed; it provides for time and one-half actual time for work over forty hours per week.[190] In *Jewell Ridge* the United Mine Workers claimed that time spent on the employer's premises going to the "face" of the vein was part of the payable work time. The majority of the Court held that it was. It was easy for them to demonstrate that the time was spent in exertion for the benefit of the employer and that it was therefore "work." Jackson in his dissent relies on the following facts: For many years the United Mine Workers in their collective agreements had excluded travel time to the face of the vein. Travel time, of course, varied depending on the age of the mine, condition of the veins, and so forth. The intention and effect of the agreements was to equalize the mines by putting payment on a uniform "face to face" basis. These agreements had been much considered by Congress when the legislation was under consideration and the Mine Workers had sought assurances that the legislation would not disturb the agreements. Jackson quotes [191] extensively from a colloquy between Senator Walsh and Justice (then Senator) Black:

Mr. Walsh. Next, does the bill affect collective-bargaining agreements

141 (9th Cir. 1952), 66 HARV. L. REV. 348. But in my opinion it was the SEC rather than the Court which acted badly in this case. The Chenerys' conduct at the very worst was borderline; forfeiture of the shares meant simply a windfall to the corporation — the other shareholders. And it had already appeared in the later stages of the litigation that the Commission was not prepared to condemn manager trading in two other pending cases. See JAFFE, ADMINISTRATIVE LAW 208 (1953).

[188] 325 U.S. 161, rehearing denied, *id.* at 897 (1945).

[189] Mr. Crompton Harris had last been a partner of Mr. Justice Black in 1925. Black had had no connection with the case at bar. Professor John P. Frank has reviewed the problem in his *Disqualification of Judges*, 56 YALE L.J. 605 (1947). He finds no precedent or support for Jackson's position that Black was disqualified. Discussion of the incident was revived in the following year as a result of Jackson's claim that while he was away in Nuremberg Black had worked against his appointment as Chief Justice. Jackson at that time said that Black's participation in *Jewell Ridge* involved no "lack of 'honor'" but that he "wanted the practice stopped," and "if it is ever repeated while I am on the bench I will make my Jewell Ridge opinion look like a letter of recommendation in comparison." *Id.* at 606 n.3.

[190] §§ 6, 7, 52 STAT. 1062, 1063 (1938), as amended, 29 U.S.C. §§ 206, 207 (1952).

[191] 325 U.S. at 177, quoting 81 CONG. REC. 7650 (1937).

already made or hereafter to be made between employer and employee?
Mr. Black. It does not.

This statutory history, if read closely, is not perhaps so conclusive as it appears on the surface [192] but it is relevant to the "tone" of the legislation. Somewhat later, when the question was raised whether the "face-to-face" basis was proper, the Mine Workers had protested that a change would destroy the accepted basis for uniform bargained rates and create chaos and confusion. The Wages and Hours Administration acquiesced. "And now at the first demand of employees the Court throws these agreements overboard . . . ." [193] "We doubt if one can find in the long line of criticized cases one in which the Court has made a more extreme exertion of power or one so little supported or explained by either the statute or the record in the case. Power should answer to reason none the less because its fiat is beyond appeal." [194] To Jackson the decision was shocking.[195] It violated every canon of his legal philosophy as lawyer, as judge. It unsettled hundreds of thousands of closed transactions which had gone relatively unquestioned. It opened up the courts, as it turned out, to $5,000,000,000 of litigation. It answered to no seriously felt claim of oppression or injustice. It violated the apparent terms of the legislative bargain. It countered this complex of considerations with an abstract interpretation of the word "work." It must be admitted, however, that Jackson's reliance on the particularities of collective bargaining could create interpretative and administrative difficulties.[196]

---

[192] It might be read, for example, as meaning that if the statutory minima were satisfied, collective bargaining would not be disturbed. Was the measurement of work one of the minima to be defined by statute?

[193] 325 U.S. at 172.

[194] *Id.* at 196.

[195] Jackson had concurred with the majority in the earlier case of Tennessee Coal, Iron & R.R. Co. v. Muscoda Local, No. 123, 321 U.S. 590 (1944) (7–2 decision), which was like *Jewell Ridge* except that the iron miners there involved had not been represented by a union so that the wage agreements were not the result of collective bargaining. He concurred on the ground that "each . . . industry stands on its own conditions." *Id.* at 605. Justice Murphy wrote for the majority in both cases. In *Muscoda* he first demonstrated that going to the face of the mine was compensable work under the statute. In reply to the argument that by immemorial custom and collective bargaining it was not "work" he stated that there had been no collective bargaining and that the district court had found no custom, but that in any event "any custom or contract falling short of . . . [the] basic policy . . . cannot be utilized to deprive employees of their statutory rights." *Id.* at 602–03.

[196] A peculiarly unsympathetic and drily linguistic approach to the same

One collateral point deserves mention. Jackson in this case relied heavily on statutory history. This would seem to arise naturally out of his respect for the terms of the statutory bargains as contrasted with the mere statutory words, and of course the lure to quote Justice Black against himself was irresistible. But in his curious concurrence in *Schwegmann Bros. v. Calvert Distillers Corp.*,[197] he cleverly expresses his impatience with this method: "[I]t is only the words of the bill that have presidential approval . . . . It is not to be supposed that, in signing a bill, the President endorses the whole Congressional Record." [198] When a member of the Government he had, no doubt, observed — perhaps aided and abetted — the fabrication by the administration of self-serving statutory history; and if so his anger might have been compounded by guilt. More than once he has acknowledged, sometimes with charming humor, the inconsistencies of his successive avatars.[199] His alleged reason for disapproval was that "laws

---

statute is found in Jackson's opinion for the majority in Western Union Tel. Co. v. Lenroot, 323 U.S. 490 (1945), denying application of the child labor provisions of the act to Western Union messenger boys. Professor Cox criticizes Jackson's refusal to interpret the admittedly inadequate statutory provisions in the light of the general purposes of the legislation. Cox, *Judge Learned Hand and the Interpretation of Statutes*, 60 HARV. L. REV. 370, 385–90 (1947). He quotes Jackson's remark: "We take the Act as Congress gave it to us, without attempting to conform it to any notions of what Congress would have done if the circumstances of this case had been put before it." 323 U.S. at 501.

[197] 341 U.S. 384 (1951).

[198] *Id.* at 396.

[199] In McGrath v. Kristensen, 340 U.S. 162, 176–78 (1950) (concurring opinion), he says of his prior opinion as Attorney General, contrary to his present decision:

I am entitled to say of that opinion what any discriminating reader must think of it — that it was as foggy as the statute the Attorney General was asked to interpret. . . . Perhaps Dr. Johnson really went to the heart of the matter when he explained a blunder in his dictionary — "Ignorance, sir, ignorance." But an escape less self-deprecating was taken by Lord Westbury, who, it is said, rebuffed a barrister's reliance upon an earlier opinion of his Lordship: "I can only say that I am amazed that a man of my intelligence should have been guilty of giving such an opinion." If there are other ways of gracefully and good-naturedly surrendering former views to a better considered position, I invoke them all.

And in Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 647 (1952), involving the constitutional power of the President to seize the steel industry to settle a labor dispute, he says in a concurring opinion:

The claim of inherent and unrestricted presidential powers has long been a persuasive dialectical weapon in political controversy. While it is not surprising that counsel should grasp support from such unadjudicated claims of power, a judge cannot accept self-serving press statements of the attorney for one of the interested parties as authority in answering a constitutional question, even if the advocate was himself. But prudence has counseled that actual reliance on such nebulous claims stop short of provoking a judicial test.

This concurrence is in my opinion a most brilliant exposition of "undefined presidential powers" and their relation to legislation.

are intended for all of our people to live by; and the people go to law offices to learn what their rights under those laws are"; [200] only a few large city offices would have access to legislative materials. The sentiment is true to the man. But its application is not convincing. In making a major construction of a statute which is to bind the whole country, it would be folly to impose on the Court the blinders of a country lawyer's library. *Schwegmann* is perhaps an example of the occasional distortions begotten of Jackson's lively temper.

One more case is worth adding to *Jewell Ridge* to show Jackson's method in situations where legislation and the common law, rather than the Constitution, are taken as the frame of reference. In *United States v. South-Eastern Underwriters Ass'n* [201] the United States sued a conference of fire insurers for a restraint of interstate commerce in violation of the antitrust laws. For seventy-five years it had been assumed that Congress could not regulate the insurance business. This was an inference from cases holding that because "issuing a policy of insurance is not a transaction of commerce," [202] the States might regulate the business. The Court now held that Congress might regulate insurance. But should the general prohibitions of the Sherman Act be applied to an industry for which over the course of seventy-five years the states had designed an elaborate system of regulation? The majority said "yes." Jackson said of their decision:

> Abstract logic may support them, but the common sense and wisdom of the situation seem opposed. . . . The recklessness of such a course is emphasized when we consider that Congress has not one line of legislation deliberately designed to take over federal responsibility for this important and complicated enterprise. . . . A poorer time to thrust upon Congress the necessity for framing a plan for nationalization of insurance control would be hard to find. . . .[203]

The orderly way to nationalize insurance supervision, if it be desirable, is not by court decision but through legislation. Judicial decision operates on the states and the industry retroactively. . . . [I]t is the part of wisdom and self-restraint and good government for courts to leave the initiative to Congress. . . . To force the hand of Congress is no more the proper function of the judiciary than to tie the hands of Congress. To use my office, at a time like this, and with so little justifica-

[200] 341 U.S. at 396.
[201] 322 U.S. 533 (1944).
[202] Paul v. Virginia, 75 U.S. (8 Wall.) 168, 183 (1869).
[203] 322 U.S. at 589–91. The reference was to the war.

tion in necessity, to dislocate the functions and revenues of the States and to catapult Congress into immediate and undivided responsibility for supervision of the nation's insurance businesses is more than I can reconcile with my view of the function of this Court in our society.[204]

Congress, in fact, did not find the task thus imposed on it quite so difficult as Jackson represented. It summarily returned the whole matter to the states, where it had been before the decision.[205] In meeting the problems created by the Court's rulings on the FLSA, Congress' response was somewhat more drastic; it took from the employees even more than the majority had given, thus warning of the risks of overreaching.[206]

Jackson's judicial philosophy, then, was to decide these matters in terms of the reasonable expectation of those who might consult a lawyer, a lawyer who in his turn could measure expectation on the supposition that the judges would seek their answer in the logic of the common law and of the compromises embodied in statutes. To be sure, it would be understood that the statutory logic would often be inadequate, the relative victories achieved by competing forces sometimes obscure. In such cases there would be tender spots in the law from which modest growth might be anticipated, but growths which would not too much shock any important class in the community, not too seriously disarrange existing and, particularly, completed transactions. It is sometimes put that a judge should be "disinterested." This may mean that a judge should not take counsel from his wish until he has exhausted all the other ordained avenues of judgment, until he has sincerely sought the answer in the logic of the statute as a *whole*. But it should be admitted that there may come a point where the legal material no longer gives adequate guidance. Here it is asking too much — it may indeed be stultifying — to demand neutrality. Since the law does not give the answer the judge must consult his conscience, his best wish if you will. But judicial legislation of this type — so peculiarly unrepresentative — is justified only where the methods of "disinterestedness" have failed.

Was Jackson in fact disinterested? In an absolute sense probably not. Certain of his judgments may legitimately be attributed to a mild bias in favor of the premises of a business and bour-

[204] *Id.* at 593–95.

[205] 59 STAT. 33 (1945), 15 U.S.C. § 1011 (1952).

[206] 61 STAT. 84 (1947), 29 U.S.C. §§ 251–62 (1952).

geois society. Indeed, given what has already been said of his philosophy and of the experience in which it was rooted, it would have been almost unnatural had he not occasionally equated reasonable expectation with traditional business expectation. Though when Attorney General he declaimed against big business, he was not unfriendly to it and in close cases might swing into its orbit. In *Standard Oil Co. v. United States* [207] the Court, led by Justice Frankfurter, upheld a judgment against Standard of California enjoining the company from making exclusive gasoline supply contracts with some 6.7 per cent of the independent service stations in the "Western Area," a device employed also by the other major refiners, and amounting in all to 50 per cent of total sales in the area. The statute made such agreements illegal if the effect might be "to substantially lessen competition." [208] Justice Frankfurter argued that inquiry into the actual effect on competition would be virtually impossible for a court and that it was an appropriate reading of the statute that no such inquiry was to be required. Jackson agreed that courts were ill-fitted for such an inquiry but found no escape. He thought the requirements contract, by insuring the retailer a supply, maintained competition. "If the courts are to apply the lash of the antitrust laws to the backs of businessmen to make them compete, we cannot in fairness also apply the lash whenever they hit upon a successful method of competing." [209] We cannot here evaluate this case, but there are other evidences of the skepticism or hostility to the antitrust laws implied in the quotation; there was perhaps an irritation born of a suspicion that the executive and judicial proponents of antitrust enforcement were moved by the "crusading" impulses he detected — and deplored — in the insurance case. His initial attitude to the federal regulatory process in general was neutral, even friendly, but in later years a similar note of skepticism and suspicion occasionally crept in.[210]

---

[207] 337 U.S. 293 (1949).

[208] Clayton Act § 3, 38 STAT. 731 (1914), 15 U.S.C. § 14 (1952).

[209] 337 U.S. at 324.

[210] See, for the early period, Cudahy Packing Co. v. Holland, 315 U.S. 357 (1942) (concurrence in Justice Douglas' concurring opinion); Endicott Johnson Corp. v. Perkins, 317 U.S. 501 (1943), p. 978 *supra*; Skidmore v. Swift & Co., 323 U.S. 134 (1944). For the later period note *Chenery*, *Boyce*, and *Ruberoid*, discussed pp. 983–86 *supra*, and the statement quoted at p. 954 *supra* from FPC v. East Ohio Gas Co., 338 U.S. 464, 489 (1950). The attitude revealed here becomes relevant to the search and seizure cases discussed pp. 977–78 *supra*. See also Ewing v. Mytinger

I think, too, that we must entertain the hypothesis that Jackson's federalism, his insistence on the inviolability of the national market, is as much a reflection of a "business" as of a "lawyer" philosophy, indeed is a compound of the two. American business is characteristically multistate. Even when the business man has reconciled himself to regulation, he will prefer the single system of the federal government to the costly complication and contradictions of forty-nine separate jurisdictions. The greater simplicity and certainty satisfy at the same time the instinct of the lawyer and of his businessman client.

But Jackson might well have admitted to social bias, yet still have insisted that his philosophy was valid and that he was true to it. Cardozo, having escaped contact with the world of affairs, was probably as nearly free of social bias as was humanly possible, but he was for that very reason atypical. The question for the man who has been involved with the world is whether as judge he sets his compass by his own star or by the North. It may be argued by the friends of those whom he was attacking that Jackson's philosophy was itself a purely personal choice — a "bourgeois" choice perhaps? — at best no better than another, at worst a refusal to open up roads to a more complete justice. If it be assumed that certain of the judges sought always to get more wages for a worker, always to assure him recovery for his

---

& Casselberry, Inc., 339 U.S. 594, 604 (1950) (dissenting opinion), and Penfield Co. v. SEC, 330 U.S. 585, 603 (1947) (dissenting opinion).

On judicial review see his opinions in FPC v. Hope Natural Gas Co., 320 U.S. 591, 628 (1944); Chicago & So. Airlines, Inc. v. Waterman S.S. Corp., 333 U.S. 103 (1948); United States v. Wunderlich, 342 U.S. 98, 102 (1951).

In many of the most important antitrust cases Jackson's Attorney-Generalship disqualified him. Where the Court was split most of his votes were against upholding the claim of antitrust violation. In the following he voted with a majority in favor of the defendant: Times-Picayune Publishing Co. v. United States, 345 U.S. 594 (1953); United States v. Oregon State Medical Soc., 343 U.S. 326 (1952); United States v. Columbia Steel Co., 334 U.S. 495 (1948). In the following he dissented from a judgment against the defendant: Timken Roller Bearing Co. v. United States, 341 U.S. 593 (1951); United States v. National Ass'n of Real Estate Bds., 339 U.S. 485 (1950); Mandeville Island Farms, Inc. v. American Crystal Sugar Co., 334 U.S. 219 (1948); FTC v. Morton Salt Co., 334 U.S. 37 (1948); Edward Katzinger Co. v. Chicago Metallic Mfg. Co., 329 U.S. 394 (1947).

Jackson was relatively favorable to the property owner in eminent domain. See United States v. Kansas City Life Ins. Co., 339 U.S. 799 (1950); United States v. Gerlach Live Stock Co., 339 U.S. 725 (1950); Kimball Laundry Co. v. United States, 338 U.S. 1 (1949); *but cf.* United States v. Willow River Power Co., 324 U.S. 499 (1945).

personal injuries, can the goal be condemned as unjust? Jackson, I believe, would have refused to answer the question in these terms. He might have expressed, indeed he did express, his irritation that the task was not being performed openly; [211] that the traditional techniques were used with tongue in cheek. He might have replied that doing justice on so broad a front required calculations as to amounts and situations which the legislature was much more fitted to make. But he would, I think, have taken more abstract ground. In undertaking such a role the Court would forfeit some of the credit needed to fulfill a role much more unique. Our society *is* a class society, at the least a society of vigorously competing interests. It is also an exceedingly mobile society, richly creating new opportunities, malignantly generating insecurities. It is a society which, in making unprecedented demands on government for change, places a heavy strain on the agencies of stability. To compose the constantly clashing demands for new opportunity our society sets up a representative legislature. To compose the day-to-day differences between man and man, and between man and organized society, it relies upon a nonrepresentative body of professionals. The warrant for their great power is the universal conviction that there is a knowable law which they can and will apply by the exercise of reason. The faith in judicial objectivity is an ultimate source of personal

---

[211] See Wilkerson v. McCarthy, 336 U.S. 53 (1949) (7–2 decision). In this case, involving a claim by an employee against his railroad employer for negligent injury under the Federal Employer's Liability Act, a state supreme court upheld a directed verdict for defendant on the ground of lack of evidence. The Court reversed. Said Jackson dissenting, *id.* at 76–77:

> If in this class of cases . . . this Court really is applying accepted principles of an old body of liability law in which lower courts are generally experienced, I do not see why they are so baffled and confused at what goes on here. On the other hand, if this Court considers a reform of this law appropriate and within the judicial power to promulgate, I do not see why it should constantly deny that it is doing just that.
>
> I think a comparison of the State Supreme Court's opinion . . . with the opinion of this Court will fairly raise, in the minds of courts below and of the profession, the question I leave to their perspicacity to answer: In which proposition did the Supreme Court of Utah really err?

Jackson and Frankfurter criticized the majority for in effect eliminating the negligence requirements from the FELA, and making it, as they believed, into a compensation law. They also criticized the majority for imposing special procedural rules favoring plaintiffs upon state courts trying FELA cases. Brown v. Western Ry., 338 U.S. 294, 299 (1949) (dissenting opinion).

For the difference between the Jackson and the Black-Douglas approach to one of the many attempts (most of which were successful) to liberalize the admiralty law in favor of employee plaintiffs, see Farrell v. United States, 336 U.S. 511 (1949).

security and social cohesion. But once it comes to be believed by one or another of the great social classes that the Court is an organ of another class, its function is impaired. This is peculiarly the case when the Court is a constitutional one and participates in the very creation of major social premises. To secure wholehearted and widespread acceptance of its pronouncements it has need of all the credit it can amass; to squander it on schemes for social betterment is foolhardy.

Jackson did not deny that in constitutional matters the judge must choose his premises, though even here choice would be limited to premises that have an adequate logical connection with constitutional texts and constitutional history. He insisted that choice was inevitable. He could hardly criticize his fellows for a practice which he avowed with such exceptional frankness. We must in fairness to his opponents keep this in mind even if he sometimes failed to do so. Criticism of a judge for imposing his wish may be valid where statute or common law is in question; it will no longer hold when the question is a constitutional one even though the wish is similar. If Marshall may (indeed must) choose, so may Taney; if Jackson, so may Black. We may, however, still complain if he plays fast and loose with his pretended constitutional choices.[212] And more important, we may still believe with Jackson that in making choices, the judge should, if he can, eschew social preferences; he should seek neutral, abstract principles of an organizing, constituent character. These principles should be as clear and simple as possible; the choice

[212] In Wheeling Steel Corp. v. Glander, 337 U.S. 562 (1949), Justices Black and Douglas dissented on the ground that the fourteenth amendment does not protect corporations. Jackson wrote for the majority and then wrote a special separate opinion pointing out that Black and Douglas had allowed newspapers to claim freedom of the press under the fourteenth amendment. Times Mirror Co. v. Superior Court, 314 U.S. 252 (1941), and Pennekamp v. Florida, 328 U.S. 331 (1946). The dissenters did not mention these cases.

In Morgan v. Virginia, 328 U.S. 373, 386–88 (1946), Justice Black joined in the Court's decision holding contrary to the commerce clause a statute segregating the races on an interstate bus. He explained that he disagreed with the Court's acting on these cases as a "super legislature," but "so long as the Court remains committed to the 'undue burden on commerce formula,' I must make decisions under it." There are, however, very few cases after this where Justice Black was prepared to exercise the power of a "super legislature." See, *e.g.*, Dean Milk Co. v. City of Madison, 340 U.S. 349, 357 (1951); Memphis Steam Laundry Cleaner, Inc. v. Stone, 342 U.S. 389, 395 (1952) (dissenting opinions).

It should be said in defense of Justice Black that a judge whose views are being persistently rejected should not be held to the same consistency as one whose views are accepted.

once made should be applied consistently; such principles may not, of course, produce justice in particular cases; responsibility for that will fall on other organs. But principles of this character applied in this spirit may best preserve the Court for the great constitutional role for which it is uniquely fitted.

IV. Conclusion

Jackson is outstanding for the vigor of his federalism. No other modern judge has defended so bold and comprehensive a program of judicial action. The great end of the Constitution, the road to manifest destiny, is the national economic market. "Such was the vision of the Founders; such has been the doctrine of this Court which has given it reality." The Court is the builder and the guardian. It will devise limits to the power of the states to regulate and tax interstate and extrastate transactions. Modest estimates of the Court's "competence" are irrelevant: "We act not by authority of our competence but by force of our commissions." Jackson envisioned a further glory of federalism: the creation by the Supreme Court of "a truly national legal system" which would guard against "the disintegrating influence of provincialism in jurisprudence" and assure "the orderly resolution of conflicts." The "interests" of the states must be subdued to the imperative of federalism.

It may strike some as contradictory that where suppression of speech or administration of criminal law was in question Jackson was more responsive to the "interest" of the states. He did not propose, as it were, a nationalized concept of civil liberties, at least in these areas.[213] He did not base this ultimately on "deference" to local or legislative judgment. That would have been inconsistent with his other views. In the flag salute case, where he did strike down the state law, he categorically denied the relevance of "deference" — "we act by the force of our commissions." Justice Black's attitudes in the two areas of "federalism" and "civil liberties" are just the reverse of Jackson's. Perhaps the views of both were in some measure the felt consequence of applicable doctrine. Black argues, as Jackson once did, that the fourteenth amendment, in so far as it incorporates the first eight articles of the Bill of Rights, imposes prohibitions

[213] However in the flag salute, the "establishment," and the segregation cases he was prepared to impose a nationalized solution.

much more precise than the unaided due process clause or the commerce clause. But it is difficult to escape the impression that in both cases the attitudes of the two Justices are choices which reflect their respective social and legal philosophy. Black, if we may oversimplify, is a social reformer. Free discussion is the road, legislation the vehicle. Jackson takes the nation as he finds it; its existing national enterprise is the best hope of the American dream. The lawyer could devise for it no better law, nothing simpler, more predictable, more inexpensive, than a guaranteed national market. On the other hand his local, and even more his German experience, awakened him to the basic problem of order. Conservative thinkers, Hobbes, Burke, Coleridge, even Mill, have always stressed the fundamental character of this problem. Class hatred, religious and racial divisions, rampant and undetected violence, all were shocks to social integrity which disturbed Jackson. He might at times admit that counter-force would not cure social disintegration [214] but the emotion with which he describes these situations manifests a strong sympathy with immediate measures of defense — however the long run problems are to be solved.

It is a remarkable and, it may be said, a dangerous institution which allows a handful of judges to choose in this fashion important premises of the organic law. But whether it is more dangerous, let us say, than a strong — or a weak — presidency, or a presidency and a Congress independent of each other, we can hardly know. All particular human institutions, it is thought, generate dangers from which they will ultimately perish. It is sometimes said that judicial power is "undemocratic," which perhaps it is if you measure it against a model government which has never existed. But since we have had a Supreme Court for some time, it requires considerable ingenuity to demonstrate that it is inconsistent with our Constitution. In all known societies there have been elites, official or unofficial, which function as leaders. Without vigorous, imaginative elites a society will fail to discover its ideals and aspirations, and will sink into apathetic mediocrity. In a "democratic" society the power of these elites is harnessed to the interests of the major social classes and ultimately limited

[214] In Dennis v. United States, 341 U.S. 494, 578 (1951) (concurring opinion), Jackson states that he has "little faith in the long-range effectiveness of this conviction to stop the rise of the Communist movement. . . . [N]o government can long prevent revolution by outlawry."

by them. The Court, it is true, is peculiar among elites, and there might be a serious question whether judicial review is workable. Professor Hartz [215] suggests that judicial review has worked because Americans agree on the protection of "property." Judicial problems thus are not matters of principle but of application. But neither the Court's power nor function has been so constant or so clearly defined as this would imply. Its protection of property has at times dangerously imperiled the Court's prestige; and many issues, for example Negro rights, state support of religion, or forced confessions are not easier to solve by reason of an agreement on property. But the Constitution and the Court have become symbols of general security. They have become sanctified by our national success. We are prepared to put up with even distasteful legal arrangements because the value of the Constitution is transcendent and because despite them our prosperity convinces us that we shall "get along" very well.

Furthermore, the Court has provided leadership in areas of doubt and confusion. This vast country with its regional, racial, and social cleavages gives rise to problems not easily resolved by legislation, and to coalition governments which are sometimes unable to develop coherent policy on important problems. Where the Court has been able to give guidance, acceptance has been furthered by the recognition of the need and by the reverence for the constitutional process. If the Court is "unrepresentative," it is for that very reason quite incapable of more than momentary despotism in our relatively free society. It is checked internally by vigorous dissent which ordinarily keeps judgment within the broad spectrum of the acceptable. It can only prevail if it commends itself to existing opinion or helps the nation to discover novel standards of performance.

---

[215] Hartz, *The Whig Tradition in America and Europe*, 46 AM. POL. SCI. REV. 989, 997 n.10 (1952). This passage came to my attention in Freund, *Umpiring the Federal System*, 54 COLUM. L. REV. 561, 576 (1954), where it is discussed.